REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 63 OF 2013

Paul Ndogo Mwangi……..…….....…….Appellant

Versus

Republic……..……Respondent

(Appeal against Judgement conviction and sentence imposed in Criminal Case Number 10 of 2012, R. vs Paul Ndogo Mwangi at Nyeri, delivered by F. W. Macharia P.M. on 14.5.2013).

JUDGEMENT

Paul Ndogo Mwangi (hereinafter referred to as the appellant) seeks to quash the conviction and sentence passed against him by the Learned Principal Magistrate in criminal case number **10 of 2012, R. vs. Paul Ndogo Mwangi** at Nyeri delivered on 14.5.2013. In the said case the appellant was charged with the offence of defilement contrary to Section **8 (1)** as read with section **8 (3)** of the Sexual Offences Act.[1]

The particulars of the offence were that on diverse dates between the **21st** day of December 2011 and 8th January 2012 in Nyeri County and Kiambu County respectively, intentionally and unlawfully caused his penis to penetrate the virgina of **J M W,** a child aged 13 years.

The appellant faced an alternative charge of committing an indecent act with a child contrary to Section **11 (1)** of the Sexual Offences Act.[2] It was alleged that on diverse dates between 21st December 2011 and 8th January 2012 in Nyeri County and Kiambu County respectively, intentionally and unlawfully touched the vagina of **J M W** a child aged 13 years with his penis.

The appellant faced a second count of causing a child to become in need of care and protection contrary to Section **127 (1) (b)** of the Children's Act.[3] It was alleged that on diverse dates between 21st December 2011 and 8th January 2012 in Nyeri County and Kiambu County respectively intentionally and unlawfully caused **J M W** a child aged 13 years to become in need of care and protection by sexually abusing her.

The appellant also faced a third count of being in possession of papers intended to resemble and pass as currency notes contrary to section **267 (A)** of the Penal Code[4] but the learned magistrate dismissed the said count for lack of offence.

In determining this appeal, this court fully understands its duty as laid down in the case of *Okeno v. R*[5] which is to subject the evidence tendered in the lower court to a fresh and exhaustive examination and draw its own conclusions. This duty was authoritatively stated by the Supreme Court of India in the recent decision in the case of *K. Anbazhagan v. State of Karnataka and Others*,[6] where a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal ruled that:-

> *"The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of*

*the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – **sans passion and sans prejudice**. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."*

PW1, J M W aged 13 years at the time of giving evidence and as the law demands the learned magistrate conducted a *Voire Dire* and was satisfied that the minor did not appreciate the meaning of an oath and allowed her to give unsworn evidence. Learned counsel for the appellant took issue with the manner in which the *voir dire* was conducted and citing authorities submitted that her evidence was not properly received. I will revert to this later. Her evidence was as follows:-

"……He took me to his house in Juja. We lived there as husband and wife. We agreed that I would be his wife. We stayed there for 17 days.....We used to have sex though not daily. I can't tell how many times we had sex. On 8/1/12 my uncle P M, C K and their friend came accompanied by Paul. I was in the bath room and they told me to dress up very fast.....we were taken to Othaya Police Station. I remained in cells until 10/1/2012 when I was released. My husband was not released.....I do not know the charges against him. I was taken to hospital by family members and a police officer. The doctors hurt my private parts. When I was With Paul he did not hurt me....."

PW 3 P M W helped in tracing the appellant and the complainant at Juja after learning from **PW2** that **PW1** was missing and took him to Othaya Police Station in the company of **PW4** while **PW5** a police officer searched the appellants house recovered some personal items belonging to the appellant among them some paper alleged to be used to make fake currency.

PW6, a clinical officer who was conversant with the handwriting of a Mr. Chege who completed the **P3** form produced it in court and gave the findings as follows; hymen was broken, No injuries were noted, nothing abnormal was noted. He noted that the hymen had not been freshly broken. On cross-examination he confirmed that at the time of examination, the complainant was not a virgin.

After evaluating the above evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section **211** Criminal Procedure Code**.**[7] The accused elected to give unsworn evidence in which he denied committing the offence. On cross-examination he said that he did not know the complainants age and that she told him she was not a child and that they stayed together until they were arrested.

The learned magistrate in her judgement analysed the evidence of all the witnesses and the above defence and convicted the appellant on count one and two and sentenced him to 20 years imprisonment for count one and a fine of Ksh. 50,000/= for count two.

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence. The appellant was represented by **Mr. Njuguna Kimani** advocate who passionately urged the court to quash both conviction and sentence. Counsel argued that the appellant was convicted on insufficient evidence and that the only evidence was that of the complainant. Counsel submitted that the *voir dire* examination was not properly conducted and cited the case of *Joseph Opanda vs Republic*,[8] *Patrick Wamuyu Wanjiru vs Republic*[9]and *Duncan Mwai Gichuhi vs Republic**[10]*** in support of his submission that the complainants evidence was not properly admitted. Counsel further submitted that on her own admission the complainant testified that she was arrested together with the appellant and was detained at the police station. Counsel submitted that the court of appeal in *Gerald Muchiri Kiruma vs Republic*[11]expressed its dislike where a witness is arrested before giving evidence. I will revert to these issues later in this judgement.

Counsel maintained that without the evidence of the complainant, the rest of the evidence is of no much value and pointed out the evidence of the clinical officer which confirmed that the hymen was not freshly

broken, and that the complainant referred to the appellant as her husband and that she went to live with him on her own free will, hence the issue of defilement cannot arise.

Regarding count two, counsel submitted that there was no evidence that the complainant was deprived anything. Counsel maintained that the evidence adduce was manifestly inadequate to support the conviction and that the magistrate shifted the burden of proof to the appellant who was under no legal obligation to proof his innocence. Counsel also insisted that the judgement does not comply with the proviso to Section 124 of the Evidence Act.[12]

Learned State Counsel **Miss Chebet** urged the court to uphold the conviction and submitted that there was overwhelming evidence to support both the conviction and sentence and that the complaint herself confirmed that she had sex with the appellant whom she referred to as her husband. Further, counsel maintained that the complainant could not give consent because she was a minor. Counsel also submitted that the trial court considered the appellants defence. On count two, counsel maintained that the appellant caused the child to be in need.

On the issue that she was arrested, counsel submitted that she was not coerced to give evidence.

I have carefully considered the submissions made by both parties. I have carefully addressed myself to the law and the authorities. I find that the following are the issues for determination, namely:-

i. *Whether the offence of defilement was proved to the required standard.*
ii. *Whether voir dire examination was conducted properly.*
iii. *Whether the prosecution adduced evidence to support count two.*

I propose to address the last issue relating o count two. Section **127(1) (b)** of the Children's Act[13] provides as follows:-

> *(1) Any person who having parental responsibility, custody, charge or care of any child and who-*
>
> *(a)---*
>
> *(b) by any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and i liable on conviction to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years, or to both.*
>
> *(2) For purposes of this section, a person having parental responsibility, custody, charge or care of a child shall be deemed to have neglected such child in a manner likely to cause injury to his health in the person concerned has failed to provided adequate food, clothing, education, immunization, shelter and medical care.*

I have carefully looked at the evidence on record and there is no single iota of evidence alleging that the appellant failed to provide adequate food, clothing, education, immunization, shelter and medical care. No evidence was tendered to show the complainant was found hungry or starving or was denied adequate food, shelter or clothing. No evidence was adduced to show that she was denied education, immunization or medical care. I fail to comprehend the reason why the prosecution included the said count in the charge sheet but more disturbing is the fact that the magistrate convicted the appellant on the said count yet no evidence was tendered at all relating to the said count. The conviction and sentence on count two is not supported by evidence and I hereby quash the same and set aside the sentence on the said count.

Counsel for the appellant submitted that *voir dire* examination was not properly conducted and cited the case of *Patrick Wamuyu Wanjiru vs Republic*[14]which ably discussed the requirements of Section **19 (1)** of *The Oaths and Statutory Declarations Act*[15] and cited the case of *Joseph Opondo vs Republic**[16]* where the Court of Appeal outlined the stages to be followed in determining whether or not a child of

tender years may give sworn evidence as follows:-

> *"There are two stages which must be followed and must appear on the record of the trial court. First, the examination must endeavour to ascertain whether the witness understands the meaning, nature and purpose of oath. The question or questions by the court must be directed to that. If the court from the answers it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not then come into play.*
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> *Where, however, the witness does not understand the meaning and purpose of an oath, stage two of the examination then follows. The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his or her evidence though not upon oath. This examination must equally appear on record. Simple elementary questions would normally be asked like date, the day, the school the witness is attending and other matters. If the court is satisfied from the answers to such questions that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence."*

From the 4 questions asked by the court, and from what was recorded, the two stages enumerated above were not covered. There was an omission and this raises questions as to whether the evidence of **PW1** was properly received. Faced with an exactly similar situation, **Sergon J** in the above cited case of *Patrick Wamuyu Wanjiru vs Republic,**[17]*held that such evidence case was not properly received. I find myself in agreement with the above two decisions and find no difficulty in concluding that on account of the aforesaid omission, the complainants evidence in this case was not properly received.

I note with great concern that it has become a common practice in many courts to either fail to conduct a *voir dire* examination completely or to do it in a manner that is totally unsatisfactory rendering such evidence open to attack and risk of being excluded for not having been properly received and for this reason I find it necessary to restate proper guidance on this issue as laid down in celebrated decisions.

The court of Appeal gave its guidance on the issue of *voir dire* examination in *Johnson Muiruri vs Republic*[18] as follows:-

> *"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In **Peter Kariga Kiume**[19] 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 voir 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 in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. **In the latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him** (Section 19, Oaths and Statutory Declarations Act,**[20]**. The Evidence Act, **[21]** Section 124,))....." (Emphasis added*

A similar opinion was expressed by the Court of Appeal in England in *Regina vs Campell*[22]

> *"..... If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.*
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> *Dealing with the question of the girl taking oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the Court of Appeal in **R vs Lal Khan**[23] made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen…. (Emphasis added).*

There Lord Justice Bridge said:

> *"The important consideration…..when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"*
>
> *There were therefore two aspects when considering whether a child should be sworn:* ***first*** *that the child had sufficient appreciation of the particular nature of the case and,* ***secondly*** *a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"*

In *Gabriel Maholi vs R,*[24] again our former Court of Appeal said that even in the absence of express statutory provisions it *is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.*

In *Gamaldene Abdi Abdirahman & Another vs Republic*[25] after considering with approval the decision in *Kibngeny arap Korir vs Republic*[26] the court stated as follows:-

> *"Does the definition of a child of tender year" by the Children Act oust the jurisprudence that has been developed in criminal trials? The first thing to note is that in passing the Children Act, Parliament was trying to address issues touching on the welfare of children. We do not think parliament was concerned about the rights of accused persons as relates to the testimony of child witnesses. As already stated there are specific reasons why voir dire examination is necessary before the evidence of a child of tender years can be accepted by the courts……In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the Children Act. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social, cultural and economic environment under which the particular child is brought up……Having reached the above conclusion, it follows that the acceptance of the complainant by the trial magistrate without conducting a voir dire examination on the witness was fatal to the prosecution case….."*

Guided by the above authorities I find no difficulty in concluding that the magistrate did not cover the two stages laid down in the above cited case of *Joseph Opondo vs Republic****[27]*** and as **Sergon J** held in the case of *Patrick Wamuyu Wanjiru vs Republic,****[28]*** the complainants evidence in this case was not properly received. Even if we admit the evidence as properly admitted, then it would also be necessary to consider the remaining evidence, whether there is sufficient corroboration.

Regarding the issue of corroboration, counsel for the appellant argued that the provisions of Section 124 of the Evidence Act,[29] particularly the proviso thereto was not complied with by the trial magistrate. The said section provides as follows:-

> *"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act,****[30]*** *where the evidence of alleged victim 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."*

The above proviso is clear. The evidence of victim if she is the only witness is admissible, but the court is required to record reasons in the judgement that it is satisfied that the witness is telling the truth. This was

a grave omission in the present case because the medical evidence, which is the only collaborating evidence clearly indicated that the complainant was not a virgin. PW6 confirmed no injuries were noted, nothing abnormal was noted. On cross-examination he confirmed that at the time of examination, the complainant was not a virgin. This leaves us with the evidence of the complainant which as earlier pointed out was not properly received, and even if I were admit it, then the above proviso to section 124 of the evidence Act comes into play.

At this juncture I find it necessary to address a third issue that injured the credibility of evidence of the complainant. Appellants counsel urged the court to note that the complainant was arrested and held in a police station for three days. This, in counsels view seriously eroded the credibility of her testimony rendering it unsafe to form the basis of a conviction.
In my view, the *credibility of a witness* is his or her worthiness of belief, determined by the following considerations:- Character, acuteness of powers of observation, accuracy and retentiveness of memory, general manner in giving evidence, relation to the matter before the court, appearance, deportment, and prejudices, general reputation for truth in his or her community, a comparison of his or her testimony with other statements made by him or her out of court, and a comparison of his or her testimony with that of others and more important possibility of coercion or interference by other persons. Where circumstances suggest that a witness may have been compelled, coerced or intimidated to give evidence, then, such evidence in my view ought to be treated with caution.

From her own evidence, it took the police to separate the two. She was arrested and locked in a police cell for three days. Why was it necessary to arrest and detain her at a police station for three days.? What was the motive for the detention? Under what circumstances was she released? What crime had she committed? Did her unexplained detention and unexplained release have anything to do with her evidence in court? Was her evidence voluntary and or free from coercion?. Without the arrest and detention, could she have agreed to voluntarily give evidence?

Counsel for the appellant cited the Court of Appeal decision in *Gerald Muchiri Kiruma vs Republic*[31]where the Court of Appeal strongly abhorred the practice whereby witnesses are arrested and later released and treated as prosecution witness. The crucial question that arises under such circumstances is whether the arrest and detention *had any impact on the credibility of the evidence offered by the witness*. In fact the Court of appeal in the aforesaid case was categorical that for a court to find that the detention of the witness had no impact on the credibility of their evidence is, with respect, highly speculative and probably erroneous. On account of the unexplained three day detention, it would be highly speculative for this court to find that the detention had no impact on the credibility of the evidence of PW1 and on that basis alone I find that her evidence was not credible to form the basis of a conviction.

Having found that the evidence of PW1 was not properly admitted as earlier stated,and having found her evidence to be incredible on account of her explained detention at the police station and on account of the omission by the learned magistrate to comply with the provisions of section 124 of the Evidence Act, I find that the appellants conviction cannot be allowed to stand because the remaining prosecution evidence cannot sustain a conviction.

Having determined the appeal on the above grounds, I also find it un necessary to consider the other grounds of appeal. Accordingly, I quash the conviction on both counts, set aside the sentences imposed by the trial court on both counts and set the appellant at liberty.

Right of appeal 14 days.

Dated at Nairobi this **2nd** day of **March** 2016

John M. Mativo

Judge

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[1] No. **3** of 2006.

[2] Ibid

[3] Act No. 8 of 2001

[4] Cap 63, Laws of Kenya

[5] {1972) E.A, 32at page 36

[6]Criminal Appeal No. 637 of 2015

[7] Cap 75, Laws of Kenya

[8] Criminal Appeal No. 91 of 1999-

[9] Criminal Appeal No. 6 of 2009-Sergon J.

[10] Criminal Appeal No. 273 of 2010- Mativo J.

[11] Criminal Appeal No. 56 OF 2006, Nyeri- Tunoi, O'kubasu & Githinji JJA, delivered on 18th May 2007

[12] Cap 80, Laws of Kenya

[13] Supra

[14]Supra

[15] Cp 15, Laws of Kenya

[16] Supra

[17] Supra

[18] {1983} KLR 447at page 448-450

[19]Criminal Appeal No. 77 of 1982 (unreported)

[20] Cap 15, Laws of Kenya

[21] Cap 80, Laws of Kenya

[22]Times, December 10, 1982.

[23]{1981} 73 Cr App R 190

[24] {1960} EA 86

[25]HC CR NO. Appeal No. 40 of 2013 Garrissa

[26]{1959} EA 92

[27] Supra

[28] Supra

[29] Supra

[30] Supra

[31] Criminal Appeal No. 56 of 2006