REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 163 OF 2011

JOSEPH MWENDWA MUTIE ..…….…… APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. B. Ochieng Principal Magistrate delivered on 25/8/2010 in Makindu Principal Magistrate Criminal Case No. 665 of 2008)

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(Before Hon. B. Thuranira Jaden J)

J U D G M E N T

1. The Appellant, **Joseph Mwendwa Mutie**, was charged with the offence of defilement contrary to **section 8 (1) (3)** of the **Sexual Offences Act No. 3 of 2006**.
2. The particulars of the offence were that on the 28th June 2008 *[particulars withheld]* within **Kibwezi District** of the **Eastern Province** committed an act which caused penetration to **N S** a child below eleven (11) years.
3. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to 20 years imprisonment.
4. The Appellant was aggrieved by both the conviction and the sentence and appealed to this court on the following grounds:-

v. **No** *voire dire* **was conducted.**
v. **The complainant's evidence was not corroborated.**
v. **The trial was conducted in a language that the Appellant did not understand.**
v. **The charge sheet was fatally defective.**
vi. **The conviction was against the weight of the evidence.**
v. **The age of the complainant was not proved.**
v. **The P3 form was not produced by its maker.**
v. **The defence case was not considered and was unfairly rejected.**
v. **The sentence was harsh and excessive.**

5. During the hearing of the appeal, the learned counsel for the defence and for the State relied on written submissions. The state conceded to the appeal.
6. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – *See* **Okeno –vs- Republic (1972) EA 32**.
7. The case for the prosecution was that on the 26/6/08 at about 3.00 p.m. the complainant, PW1 **N S**, a five year old standard two girl was at home playing with toys when the Appellant who she knew

as a neighbour called her behind the toilet and told her to remove her pants. The complainant did as instructed. The accused then did what the complainant described as **"he put his thing inside me."** Then left.

8. The complainant reported the matter to her mother, PW2 **S S**. The mother made a report at **Kibwezi Police Station**. The complainant was issued with a P3 form and was examined and treated at **Makindu District Hospital**.
9. In his defence the Appellant denied the offence. He stated that nobody saw him defiling the girl.
10. When the complainant testified on 11/8/09, no *voire dire* was conducted by the trial court.The trial magistrate only recorded his finding that the complainant was intelligent enough to warrant the reception of her evidence and also understood the meaning of oath. The trial court erred in that there was no compliance with **section 19** of the **Statutory Oaths** and **Declarations Act Cap 15 Laws of Kenya** which provides that:

"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 **of the** Criminal Procedure Code**, shall be deemed to be a deposition within the meaning of that section."**

11. A child of tender years is defined by the **Children's Act** as a child under the age of ten years. The complainant (PW1) was five years old and was therefore a child of tender age.
12. The correct procedure to be applied by the court when carrying out a *voire dire* was set out by the Court of Appeal in the case of **Kibageny –vs- Republic (1959) EA 92** which states as follows:-

"It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

13. The evidence of the complainant is very scanty. In describing the act complained about in the charge sheet, the complainant simply stated **"he then put his thing in me"**. The complainant's evidence failed to elaborate what exactly she meant by that statement. The neighbour said to have caught the complainant red handed according to the evidence of the complainant's mother (PW2) was not called to testify. This was a crucial witness who could have filled in the gaps in the complainant's evidence.
14. The doctor (PW3 **Dr John Kogora**) testified that the complainant was five years old and was examined and found to have inflamed **"labia Majora and hymen raptured"** and high a vagina swab showed an infection. The doctor's evidence confirmed that the complainant had been defiled. The doctor who filled in the P3 form is reflected in the P3 form as **Dr Wafula**. The record of the trial court does not reflect why the P3 form was not produced by the doctor who filled in the same. The evidence of the doctor who testified (PW3) does not reflect who filled in the P3 form or whether PW3 was familiar with the handwriting and signature of the person who filed in the same. If **Section 77** of the **Evidence Act Cap 80 Laws of Kenya** was relied on then the record ought to have clearly reflected the same.
15. The charge sheet failed to comply with the provisions of **section 134** of the **Criminal Procedure Code** which provides as follows:-

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

The particulars of the offence failed to allege an essential ingredient of the offence as the particular act of penetration was not stated. It is not clear from the charge sheet whether the act of penetration was caused by genital organs as defined in **section 2** of **Sexual Offences Act** or by any other object.

16. However, the failure to state the correct provision of the law under **section 8 (1) (2)** is not fatal as the same is curable under **section 382** of the **Criminal Procedure Code** which states as follows:-

" Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complainant, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier state in the proceedings."

17. The trial magistrate erred by failing to reflect the language used during the trial. The plea was taken in **Kikamba** language and the language used by the complainant (PW1) is not reflected on the record. Although the court record reflects that there was a court clerk in court throughout the trial, the trial court ought to have recorded if there was interpretation in view of the fact that the plea was taken in a different language from the language used by PW3 and PW4.
18. The defence raised by the Appellant was a mere denial. However, a conviction is based on the strength of the prosecution case and not the weakness of the defence case.
19. Although the learned counsel for the state requested for a retrial, whether retrial should be ordered or not will depend on the circumstances of the case (*See* **Mururi V R (2003) KLR**). Some of the mistakes in this case were entirely the prosecutions. The prosecution cannot therefore be allowed to have a second bite of the cherry.
20. Having evaluated the evidence, I find the appeal has merits and must succeed. Consequently, I quash the conviction and set aside the sentence.The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and **delivered** at **Machakos** this **3rd** day of **June 2014**.

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B. THURANIRA JADEN

JUDGE