REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 2 OF 2012

ANTHONY MWANGI KANYARI…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Being an appeal from the conviction and sentence by the Kangema Senior Resident Magistrate's Court Cr. Case No. 397 of 2009 (Hon. D. Orimba) in a judgment delievered on 26th March, 2010).

JUDGMENT

The appellant was convicted and sentenced to life imprisonment for the offence of defilement of a girl under the age of eleven years contrary to **section 8(1) (2)** of the **Sexual Offences Act, No. 3 of 2006**; he was alleged to have committed an act which causes penetration with a child namely BNM, a girl aged 8 in Murang'a North District within central province on 9th August, 2009.

The appellant's appeal was allegedly filed in the High Court at Nyeri; however, when the case was transferred to this court, the only records that appear to have been availed are the original record from the magistrate's court at Kangema, where the appellant was tried and convicted and a miscellaneous application filed in the High Court at Nyeri, apparently for bail pending appeal.

In the application for bail, the applicant referred to his appeal filed as appeal no. 85 of 2010; apart from the appeal number, I could not locate the appellant's petition for appeal and on 14th February 2014, I directed the deputy registrar to liaise with the deputy registrar at the High Court in Nyeri and avail the original file in Nyeri High Court Criminal Appeal No. 85 of 2010.

For some reason, that order was not complied with; it may be that the appellant's petition was either misplaced or misfiled at the registry at Nyeri or may have disappeared in the course of movement of files from Nyeri to Murang'a when Murang'a was established a High Court station in October, 2012. Since there is evidence that the appeal was filed, the appellant cannot be held responsible for its misfiling or misplacement and this court will not delay any further the interrogation of his trial and the decision that the trial court came to.

When the matter came up in court on 17th June, 2014, Mr Njeru for the state submitted that even as the appellant pursues his appeal, there was a possibility that he was a child as defined under the **Children Act (cap 141)** at the time he was convicted. He applied that the appellant be taken for age assessment.

The court directed that the appellant be taken for age assessment and according to the medical report that was eventually filed in court 26th June, 2014, the appellant was estimated to be twenty years old as at 23rd June, 2014. This then implied that at the time the appellant was convicted on 26th March, 2010, he was

approximately fifteen years old and based on this fact counsel for the state conceded to the supposed appeal and urged the court to find that the appellant ought to have been convicted under **section 191** of the **Children Act (cap 141)** in the circumstances. He further asked the court to reduce the appellant's sentence to the term he had been in prison.

In the absence of a petition for appeal, it is difficult to tell the grounds upon which the subordinate's court's decision was sought to be faulted; however, even without the petition, I have had occasion to read the record from the magistrate's court to satisfy myself as to the correctness, legality or propriety of the learned magistrate's finding, the sentence he meted out against the appellant and also the regularity of the trial proceedings. This I am empowered to do *suo moto* in exercise of this court's powers of revision under **section 362 of the Criminal Procedure Code**. I will proceed accordingly.

I have noted from the trial court's record two things which would, ordinarily render the appellant's conviction unsafe. In the first instance the only direct evidence linking the appellant with the offence was that of the complainant herself. Being a child of tender years, it was mandatory that she is subjected to a *voire dire* examination; the learned magistrate appears to have been fully aware of this requirement and in his attempt to comply with the requirement, he went about it this way:-

Court: What is your name?

Complainant: My name is BNM

Court: How old are you?

Complainant: I am 8 years old

Court: Do you go school?

Complainant: Yes I am in Standard three at [particulars withheld]

Court: Do you know where you are now and why?

Complainant: I am in Kenyan court for a case. I was defiled.

Court: The complainant to be affirmed. She understands well what is going on around her.

The basis of a *voire dire* examination is section **19 of the Oaths and Statutory Declarations Act**, (Cap 15). It provides as follows:

"Where in any proceedings before any court or person having by law or consent of the 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 as aforesaid, 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 other person as aforesaid, 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."

The tenor of this provision, as far as taking evidence on oath from a child of tender years is concerned, is that before his or her evidence is taken on oath the court must first establish that the child understands what an oath is all about or rather the nature of an oath; thus the court can only come to this conclusion after examining the child in that regard. There is nothing from the conversation between the complainant and the court to suggest that the complainant understood the nature of an oath for the court to come to conclusion that she could be affirmed and give her evidence on oath. The conclusion by the learned magistrate that the complainant "understands well what is going on around her" was not sufficient to

commit her to testify on oath because the purpose of *a voire dire* examination is not merely to test the general intelligence of a child.

In **Nyasani s/o Bichana versus Republic (1958) E.A 190,** the court of appeal said at page 191 of its decision that**:-**

"It is the duty of the court under that section (that is section 19 of the Oaths and Statutory Declarations Act) 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". This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section."

Again in **R versus Surgenor (1940) 2 ALL ER 249** which was cited with approval in **Kibangeny versus Republic (supra),** the court while referring to **section 38 (1)** of the **Children and Young Persons Act, 1933** which is similar to **section 19** of our **Oaths and Statutory Declarations Act** that;

"That section clearly states-and this court has on more than one occasion intimated-that it is the duty of the presiding judge to satisfy himself whether or not a child of tender years is in position to be sworn…Those who preside over criminal trials ought to remember that it is the duty of the presiding judge to make an investigation for himself."

Failure by the court to conduct a *voire dire* examination or conduct a proper *voire dire* examination is normally fatal to a conviction where there is no other independent evidence linking the accused person to the offence for which he has been charged.

In the case of **Sakila versus Republic (1967) E.A** , the court (Platt, J as he then was) referring to the decisions in the cases of **Kibangeny Arap Kolil versus Republic** (supra), **Nyasani s/o Bichana versus Republic (1958) E.A 190**, **Fransisio Matovu versus Republic (1961) E.A 260** and **Oloo Gai versus Republic (1960) E.A 86** said at page 406 that:-

"It is well established that before evidence of a person of tender years is admitted, a voire dire examination should be carried out in order that the court may satisfy itself that the witness is possessed of sufficient intelligence and that he understands the duty of speaking the truth in order to justify the reception of his evidence. And further that where it is clear that he understands the nature of the oath, his evidence may then be received on oath or affirmation. Where this procedure is not carried out and the evidence of a person of tender years is of a vital nature, it may be that the omission may occasion a miscarriage of justice."(Underlining mine).

The court in this case allowed the appellant's appeal, quashed conviction and set aside the sentence meted out against him; the court held that where there is no other evidence other than that of the child of tender years who has not been properly examined the conviction cannot be sustained.

In the case against the appellant, the only other evidence would have been the evidence of the clinical officer; however, in his report, the clinical officer did not establish any connection between the act of defilement and the appellant. This connection was necessary considering that the complainant was alleged to have been defiled on 9th August, 2009, but it was not until the 15th December, 2009 that he examined the child and filled the P3 form.

The second issue I have noted from the trial record is that the complainant's age was not established beyond reasonable doubt. The complainant's mother testified that the complainant was nine years old but there was no documentary proof to support her testimony. The only other place the age of the complainant was mentioned is in the P3 form but that bit of information was certainly given to the police by the complainant or her mother and adopted by the clinical officer who examined the complainant; there is no evidence of independent assessment of the complainant's age.

It is important to note that the age of a complainant is a vital element in any offence under **section 8** of the **Sexual Offences Act** and it is imperative that it must be proved beyond reasonable doubt. Under that provision, age is not only an important component in the definition of the offence of defilement itself but it also defines the punishment which the offender will be subjected to upon conviction. Without any sort of documentary proof either by way of a birth certificate, a clinical card or an age assessment report, it would not be possible to state with any certainty that the complainant was of a particular age at the time the offence was committed and conclude that the appellant was appropriately charged. The issue of age cannot be left to speculation and without proof a conviction under **section 8** cannot be upheld.

The state counsel conceded to what would be the appellant's appeal for a different reason; that being a minor, the appellant should have been convicted under **section 191** of the **Children Act**. I would agree with the state counsel only to the extent that if there was any basis for conviction of the appellant he ought to have been convicted under **section 191 of the Children Act** which provides various methods of dealing with child offenders; however, for reasons I have stated, there was no basis for conviction of the appellant irrespective of his age.

In the ultimate, in exercise of the powers given to this court under **section 364 (1) (a) of the Criminal Procedure Code,** I would reverse the learned magistrates finding and sentence and acquit the appellant accordingly. He is thus set at liberty unless he is lawfully held under a separate warrant.

Signed dated and delivered in open court this 13th day of October 2014

Ngaah Jairus

JUDGE