



**Samuel v Republic (Criminal Appeal 12 of 2020)
[2023] KECA 15 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KECA 15 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 12 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 20, 2023**

BETWEEN

ALI NDUNGE SAMUEL APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Mombasa (Mativo, J.) delivered on 13th January 2020 in High Court Criminal Appeal No. 58 of 2018)

JUDGMENT

1. The appellant, Ali Ndunge Samuel, was charged with the offence of defilement contrary to section (8) (1) as read with section (8)(2) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on July 12, 2018 in Malindi sub-county of Kilifi county, he intentionally and unlawfully caused his penis to penetrate into the anus of a male juvenile FOA, a boy aged 11 years. He was convicted by the Chief Magistrate's Court at Malindi in a judgment delivered on September 27, 2018 and sentenced to life imprisonment. His appeal to the High Court (Mativo, J, as he then was) was dismissed in a judgment delivered on January 13, 2020. He is before this court on a second appeal.
2. The facts as established by the two courts below are as follows: FOA, then an 11-year-old boy in standard 3 at [Particulars Withheld] Primary School had on July 12, 2018 attended Madrasa school at [Particulars Withheld]. The appellant was also a student at the Madrasa. FOA, the appellant and other students spent the night of July 12, 2018 at the Madrasa. FOA and the appellant slept on the same mattress. FOA testified that at midnight, the appellant defiled him. In his words:

“...I and the accused were sleeping on one mattress. I was wearing a vest and short. He was sleeping behind me. He pulled down my shorts. It was an elastic waisted short. He then inserted his penis into my anus. (pointing). I was surprised. I started crying because I felt



pain. He told me to be silent (nyamazaza). I continued crying. Hamis woke up. He asked what the problem was. I told him accused had entered me from behind.”

3. Immediately thereafter, FOA proceeded to an adjacent room where RMW (PW2), a fellow student at the Madrasa, was sleeping and informed him what had happened. The madrasa teacher (U) was called in and the appellant and FOA were escorted to administration police camp. FOA left the appellant with the police and returned to the Madrasa. In the morning at 6.00 am, FOA went home where, according to his mother (PW3), he bathed, wore clothes and went to school. Later that morning, PW3 learnt from her husband what had happened and went to the police camp from where the appellant and FOA were then taken to Malindi Police Station. FOA was then referred to hospital.
4. Police constable Charles Muriuki (PW6) of the gender desk at Malindi Police Station was the investigating officer. He recorded witness statements and escorted FOA to Malindi Hospital. Moses Simba (PW5) a clinician at the hospital examined FOA. Upon examination, PW5 found “bruises on anal surface and there was tenderness. The anal was widely open and the specter muscles loose”. He produced his treatment notes, laboratory report and P3 form which he completed.
5. The appellant in his unsworn statement in defence stated that he understood the evidence against him. He stated that he had slept in one mattress with the complainant. He went on to say that:

“...the complainant said I had sodomised him. He stood up and reported to others. They called the teacher. I asked the complainant to forgive me because I was in my sleep. It is the devil who entered my head. I did not intend to sodomise him.”
6. The trial court was satisfied that the prosecution had established its case to the required standard as all the ingredients of the offence, namely, the age of the complainant, penetration, and identity of the perpetrator had been proved. The learned trial magistrate expressed:

“I am satisfied beyond a shadow of doubt that the prosecution has proved the guilt of the accused to the required standards. Accused stated that he was 18 years so he was correctly tried as an adult. I find the ingredients of the charge all proved. I find the accused person guilty as charged.”
7. As already indicated, the appellant’s first appeal was dismissed by the High Court. In this second appeal, the main complaint as set out in the grounds of appeal and expounded on in the written submissions is that both courts below erred in failing to find that the failure by the trial court to conduct a *voire dire* in compliance with section 19(1) of the *Oaths and Statutory Declarations Act* is fatal and the conviction should therefore be quashed. Other grievances are that the trial court did not ask whether the appellant had any questions for the prosecution witnesses; that the two courts failed to find that the appellant was a minor at the time of commission of the offence and in failing to have his age assessed; and that both courts erred in failing to find that the mandatory life sentence is manifestly harsh and excessive.
8. During the hearing of the appeal before us on September 27, 2022, the appellant, appeared virtually from Shimo La Tewa Prison. He urged us to consider his written submission. Learned prosecution counsel, Mr Kirui who appeared for the respondent relied on the respondent’s written submissions dated May 25, 2022 stressing that the prosecution established its case to the required standard without specifically addressing the complaint on *voire dire*.



9. We have considered the appeal and submissions. Our mandate, on a second appeal such as this is circumscribed. In *Karani v R* [2010] 1 KLR 73 this court stated:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

10. Bearing that in mind, we begin with the complaint that both courts erred in failing to find that the failure by the trial court to conduct a *voire dire* in compliance with section 19(1) of the *Oaths and Statutory Declarations Act* is fatal and that the conviction should therefore be quashed. The appellant contended that the trial court did not conduct a *voire dire* examination of the complainant and that if it did, the manner in which it was done did not comply with the law. In that regard, reference was made to the decision of this court in *Johnson Muiruri v Republic* [1983] KLR 447 where the court expressed:

“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 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 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 corroborated by material evidence in support thereof implicating him (section 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.”

11. The record of proceedings before the trial court show that on July 19, 2018, prior to the evidence of the complainant being tendered, the prosecutor stated: “my next witness is a 11 years old juvenile. I request that court to examine him.” Thereafter, the appellant stated, “I am ready” after which it is recorded:

“Court-I have examined I O A and(sic) juvenile 11 years. He is intelligent enough for his evidence to be received. He understands the meaning of oath sworn evidence.”

12. The complainant was then sworn and proceeded to testify on oath. In the impugned judgment, the learned judge of the High Court addressed at length the appellant’s complaint in this regard, including the jurisprudence on the subject before expressing that:

“...the magistrate ought to have recorded the questions as she asked the minor and the answers before recording her conclusion. However, she allowed the minor to give sworn evidence after she was persuaded that he understood the meaning of oath. I find no reason to exclude



the evidence. The weight of the evidence will be considered together with the rest of the prosecution evidence and the appellant's defence."

13. The approach taken by the learned judge is consistent with the holding of this court in in *Maripett Loonkomok v Republic* [2016] eKLR that failure to observe the provisions as to voir dire does not automatically vitiate the conviction. It is necessary to reproduce at length, what this court stated in *Maripett Loonkomok v Republic*:

"We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, criminal appeal No 10 of 2014.

And later in the same decision:

"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."

14. Based on the foregoing, we are unable to fault the approach taken by the learned judge. There was sufficient evidence, including the appellant's own statement tantamount to admission of guilt, on the basis of which he was convicted. There is no merit in the complaint.
15. Next is the complaint that the trial court did not ask whether the appellant had any questions for the prosecution witnesses. The record in this regard shows that after the testimony of every prosecution witness, the appellant was accorded an opportunity to cross examine. In every case it is indicated, "cross examination by accused-nil." Furthermore, quite apart from the fact that this matter has been raised for the first time in this appeal and appears to be an afterthought, the record shows that upon the finding by the trial court after the close of the prosecution case that the appellant had a case to answer, his rights were explained to him in accordance with section 211 of the *Criminal Procedure Code*.
16. There is then the complaint that courts failed to find that the appellant was a minor at the time of commission of the offence and in failing to have his age assessed. The appellant submitted that he was aged 17 years 11 months old at the time of the commission of the offence on July 12, 2018, and that under the provisions of the *Children Act*, there is no provision for sentencing a child to life imprisonment. Counsel for the respondent on the other hand submitted that this assertion is unsubstantiated as it is not supported by any evidence and that being an issue of fact, it is a matter outside the purview of this court in a second appeal.
17. In its judgment, the trial court held that the appellant "was correctly tried as an adult" as he stated that he was 18 years old. Concurring with the trial court, the learned judge of the High Court held that the argument by the appellant that he was under age was unsustainable. The High Court noted that appellant is on record as having stated that he was 18 years; that from the time he was charged with the offence on July 16, 2018 to the time he gave his defence on August 6, 2018 was "barely three weeks" and there was nothing to show that he was not 18 years at the time he committed the offence noting



further that “the learned magistrate who had the benefit of seeing” the appellant in court “addressed the issue of age in her judgment.” We are unable to fault the learned judge. There is no demonstration that the judge considered matters he ought not to have considered or that he failed to consider matters he should have considered or that looking at the evidence as a whole he was plainly wrong in reaching that decision.

18. As regards sentence, we understand the appellant to be inviting us to apply the principle in the Supreme Court decision in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. We are, however, unable to do so in light of the subsequent of the Supreme Court of July 6, 2021 in *Francis Karioko Muruatetu & another v Republic and Katiba Institute & 5 others (amicus curiae)* [2021] eKLR, which clarified that the principle in the earlier decision is only applicable to murder cases. Moreover, severity of sentence is a matter outside our mandate by reason of section 361 of the *Criminal Procedure Code*.

19. In conclusion, the appeal fails and is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

