



**Lomaisia v Republic (Criminal Appeal 136 of 2018)
[2023] KECA 148 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 148 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 136 OF 2018
F SICHALE, FA OCHIENG & LA ACHODE, JJA
FEBRUARY 17, 2023**

BETWEEN

CHRISTOPHER LOMAISIA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kapenguria (S.M. Githinji, J.) delivered and dated 6th January, 2017 in HC. CR.A. No. 10 of 2017)

JUDGMENT

1. Christopher Lomasia, the appellant herein is before us on a second appeal. He was charged and convicted for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. He was sentenced to serve 20 years' imprisonment. Being dissatisfied with the conviction and sentence by the trial court, he lodged an appeal in the High Court. His appeal to the High Court was dismissed, with the High Court reaching a concurrent finding as that of the trial court. He was dissatisfied with the decision of the High Court, and he has lodged the current appeal.
2. Our mandate as a second appellate court, as provided for under 362(1)(a) of the *Criminal Procedure Code* is limited to addressing only matters of law. This position has been reaffirmed by this Court in *Adan Muraguri Mungara v Republic* [2010] eKLR where this court held thus:

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere.”



3. It is on this basis that we will render ourselves in this appeal. As we have already stated in the opening paragraph of this judgment, the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the [Sexual Offences Act](#). The particulars of the offence were that on October 11, 2016 at [particulars withheld] village in Mwino Location of Pokot Central sub-county in West Pokot County, the appellant intentionally caused his penis to penetrate the vagina of N.K, a child aged 15 years.
4. The case for the prosecution was presented through 4 witnesses being the complainant (PW1), her father (PW2), medical expert witness (PW3) and the investigating officer (PW4). In summary, the case against the appellant was that on October 11, 2016, the appellant sneaked into the house where the complainant and her small brother were sleeping. He had his mobile phone light on, he introduced himself and proceeded to defile the complainant. When done, he asked the complainant to allow him do it again but the complainant screamed asking him to get outside.
5. The complainant's father (PW2) heard the screams and left his house for the house where his daughter was. Upon asking what was happening, her daughter informed him that the appellant was in the house. PW2 then locked the said house from outside and he called the neighbours and some Kenya Police Reservists (KPR) whom he informed what had transpired. When the door was opened, the appellant was arrested inside the said house. The medical expert witness who attended to the complainant confirmed that the complainant was defiled.
6. The appellant was placed on his defence and his evidence was that he was a businessman living at Chepkobeh. He stated that on the material date, he had spent his day at the shopping center where he had gone to buy maize. And that it is while at the center that he was arrested by two KPR officers and taken to the area chief and later booked in cells. He also alluded to a land dispute with the complainant's father (PW2) but denied ever committing the offence that he was charged with.
7. In this appeal, the appellant raises five grounds of appeal, as follows. The first ground is that the charge sheet was defective and in breach of sections 134, 137 and 214(1) of the [Criminal Procedure Code](#). The second ground is that no voir dire examination was conducted on PW1 hence the evidence of PW1 was taken unprocedurally and in breach of section 19(1) of the [Oaths and Statutory Declarations Act](#) and sections 124 and 125 of the [Evidence Act](#).
8. The third ground is that the evidence of the prosecution's witnesses was marred with contradictions and inconsistencies. Fourth, the appellant is aggrieved by the fact that no Investigations Report was produced, and also that the prosecution failed to call some critical witnesses. The fifth ground is that his defence was not considered thus constituting violation of section 169 of the [Criminal Procedure Code](#).
9. When this matter came before us in plenary, parties agreed to have the matter canvassed by way of written submissions which they had both filed. On the issue of defective charge sheet, the appellant took the view and submitted that because the words "intentionally and unlawfully" were omitted from the charge sheet, the charge could not stand as it did not comply with section 134 of the [Criminal Procedure Code](#).
10. To buttress this view, the appellant sought to rely on the decision of [David Odhiambo v Republic](#), CRA No. 5 [2005] CA Mombasa. The appellant also referred the Court to the provisions of section 43(1) of the Sexual Offences Act for the definition of the words "intentional and unlawful" acts and the case of [Suleiman Juma alias Tom vs. Republic](#) 181 [2002] CA to reinforce his assertion that the omission of the words "intentionally and unlawfully" rendered the charge sheet defective.
11. The appellant submits that since the complainant (PW1) was 15 years old, the trial court ought to have admitted her to voir dire examination prior to taking her evidence. Failure to adopt that procedure, he



argues, rendered her evidence inadmissible as the same violated section 19(1) of the *Oaths and Statutory Declarations Act*. In support of his submissions on this issue, he referred the Court to the decisions in *John Muiruri v Republic* [1983] KLR 445, *Patrick Kathurima v Republic* [2015] eKLR and *JGK v Republic* [2015] eKLR which decisions emphasised the importance of voir dire examinations of minors, prior to taking their evidence.

12. The appellant further submitted that the evidence of the prosecution's witnesses was marred with contradictions and inconsistencies thereby falling short of achieving the evidentiary threshold required under sections 107, 109 and 110 of the *Evidence Act*. In that regard, he took issue with the evidence of PW1 because she failed to produce her inner pants as an exhibit. He also noted that there was no evidence of spermatozoa. In that regard, the appellant cited the decision in *Mwangi v Republic* [1984] KLR 595 where the court ruled that the presence of spermatozoa alone was not conclusive that there was sexual intercourse.
13. The appellant further submits that the prosecution failed to call as a witness the KPR officers who arrested him. In his view, the arresting officers were critical witnesses in the case and failure to call them is fatal to the prosecution's case. He invited the court to draw a negative inference on this failure. In that respect, the appellant cited the case of *Bukenya & another v Uganda* [1972] EA 547. Finally, the appellant submits that his defence specifically in relation to the alleged land dispute, was overlooked. In his view, had the KPR officers been brought to testify, their testimony would have shed more light on this issue. He therefore submits that the two courts below erred in dismissing his defence. The appellant prays that his appeal be allowed and his conviction be quashed and sentence set aside.
14. Regarding the issue of a defective charge sheet, counsel for the respondent submitted that under section 8(1) of the *Sexual Offences Act*, the act of causing penetration with a child is an offence. Counsel further submits that the ingredients of that offence is penetration with a child and therefore the omission of the words "unlawful and intentional" was not prejudicial to the appellant. He also said that the omission of those words did not constitute a violation of the appellant's right to fair trial.
15. With regards to the failure by the trial court to conduct a voir dire on PW1, counsel cited the decision of this Court sitting in Mombasa in Criminal Appeal No. 68 of 2015, *Maripett Loonkomok v R* [2016] eKLR and submitted that such a failure did not vitiate the prosecution's case. Counsel also submitted that section 19 of the *Oaths and Statutory Declarations Act* is concerned with admissibility of the evidence of a child of tender years. In his considered view a child is deemed to be of tender years if he or she is of the age of 10 years or less. As the complainant was 15 years old, the respondent submitted that she was not a child of tender years. On the third and fourth grounds of appeal, counsel submitted that the evidence on record was cogent and proved beyond reasonable doubt that the appellant committed the offence. On the last ground of appeal, counsel submitted that because the appellant did not adduce the allegations of a land dispute, the same did not in any way water down the prosecution's case. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence.
16. We have carefully reviewed the record of appeal as well as the submissions by both parties. We are cognizant that our mandate is limited to giving consideration to points of law as this is a second appeal.
17. In our view, this appeal raises the following two issues for determination, namely, whether the charge sheet was defective, and second, whether the failure to conduct voir dire on PW1 rendered her evidence inadmissible.



18. We have looked at the charge sheet. We note that the only missing word is “unlawful” while the word “intentionally” is included in the particulars of the offence. Section 43 of the [Sexual Offences Act](#) defines the words “unlawful and intentional” as follows:

“43.

(1) An act is intentional and unlawful if it is committed –

- (a) in any coercive circumstance;
- (b) under false pretences or by fraudulent means; or
- (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.” (Emphasis ours)

1. Our analysis of the offences under the [Sexual Offences Act](#) reveals that the where parliament desired the use of the words “intentional and unlawful” to be invoked, the said wordings were prescribed in the statement of those offences. For example, the offences under section 3 (rape), section 4 (attempted rape), section 5 (sexual assault), section 6 (induced or compelled indecent act), among others, have the words “unlawful” and/or “intentional” incorporated in the statement of offence. The same cannot be said of the offence of defilement under section 8(1). This position was adopted by this Court in *Josephat Wanjala Olbai v Republic* [2019] eKLR where the Court stated at paragraph 25 that:

“The offence of defilement is unlawful and the absence of the words “intentional” and “unlawful” in the particulars of the charge do not render the charge defective. The words ‘intentional’ and ‘unlawful’ are not ingredients of the offence of defilement under section 8(1) of the Sexual

Offences Act. Defilement itself is unlawful. Those words are only elements of a charge of rape and attempted rape under section 3(1) and section 4 of the [Sexual Offences Act](#) respectively.”

20. In this case, the particulars of the charge, as framed, matched the statutory definition of the offence of defilement as provided for under section 8(1) of the [Sexual Offences Act](#).
21. The case of [David Odhiambo v Republic](#), CRA No. 5 [2005] CA Mombasa which was cited by the appellant is distinguishable from this case. We so find because the offence in the case was rape contrary to section 140 of the [Penal Code](#). Of more relevance to the issue herein is the Court’s dictum in that case as follows:

“There can be no reason for not giving the statutory definition of rape in the particulars of the charge. The same applies to the provisions of section 143 (abduction of girls under sixteen years of age), section 144 (indecent assaults on females) and section 145 (1) and (2) (defilement and attempted defilement of girls under 14 years). In future, we would expect the prosecution and trial magistrates to ensure compliance with these elementary requirements. We shall say no more than that on that aspect of the matter.”

22. Based on the reasons we have given above, we find and hold that in offences under section 8(1) of the [Sexual Offences Act](#), the omission of the words “unlawful and intentional” does not render the charge defective.

Accordingly, we hold that the charge herein was drawn in conformity with the provisions of section 137 of the [Criminal Procedure Code](#).



23. The next issue is whether the failure to conduct voir dire on PW1 rendered her evidence inadmissible. It is the appellant's contention that because the complainant was a minor, the trial court ought to have subjected her voir dire examination prior to taking her evidence. He argues that the failure to adopt that procedure rendered her evidence inadmissible, hence reliance on her evidence to support his conviction is untenable. The respondent on their part contend that failure to conduct voir dire was not fatal to the proceedings and did not render the evidence of PW1 inadmissible.
24. The fact that the trial court did not subject PW1 to a voir dire examination is not in dispute. What is in contention is whether such a failure is fatal to the evidence of PW1. Section 19 of the *Oaths and Statutory Declarations Act* which the appellant relied upon is concerned with the reception and admissibility of evidence of a child of tender years. The said section declares that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath.
25. The respondent has in their submissions urged this Court to rely on section 2 of the *Children Act* for the definition of a child of tender years. However this Court has held in numerous decisions that the definition under section 2 of the *Children Act* is only intended for the protection of children from criminal responsibility and not as a test of competency to testify. As to what age is regarded as tender years, this Court, in *Maripett Loonkomok v Republic* [2016] eKLR expressed itself thus:
- “However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years” is in section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No. 137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination.”
26. Based on the foregoing analysis and the authority cited above, we find that because the complainant was 15 years old, the trial court was not under an obligation to conduct voir dire examination. It therefore follows that the evidence of PW1 was properly taken. She was also subjected to cross examination as well as further cross examination when the appellant secured the services of an advocate. This ground of appeal is therefore without merit.
27. The appellant had submitted that the KPR officers would have shed more light on this issue concerning the alleged disputes over land. But then we note that the appellant did not raise the issue of the alleged land dispute until he had been put to his defence. He did not raise it when cross-examining prosecution witnesses. Be that as it may, it was always open to the appellant to call the KPR officer as his witness. He did not call the said witness and he has not explained why he did not do so.
28. We find that his criticism of the prosecution, for failing to call the KPR officer as a witness, is without any sound foundation.
29. The upshot of the foregoing is that this appeal is without merit and is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 17TH DAY OF FEBRUARY, 2023.

F. SICHALE



.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

F. OCHIENG

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

