JOO v Republic (Criminal Appeal 172 of 2018)
[2023] KECA 1248 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1248 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 172 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

OCTOBER 6, 2023

BETWEEN

JOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment/Decision of the High Court of Kenya at Kisii (R. N. Sitati, J) dated 30th January 2014 in Kisii Criminal Appeal No. 83 of 2012)

JUDGMENT

1. JOO (the appellant) was convicted of the offence of defilement of a girl under the age of 18 years contrary to section 8(1) of the *Sexual Offences Act 2006*, No 3 of 2006. The particulars of the offence were that on the 1st day of July, 2008 in Migori District within Nyanza Province, the appellant caused penetration of the genital organ of DA a girl aged four years. Upon conviction, the trial court (S M Shitubi, SPM) imposed a life imprisonment against the appellant. His first appeal was unsuccessful when the High Court (R N Sitati, J), in a judgment dated January 30, 2014, affirmed both conviction and sentence.

2. Although it was the testimony of her mother that she was aged 7 years, DA (PW1) told the court that she was 11 years old at the time of her testimony. The evidence of the child was that the appellant, a man known `to her, put her on her mother's bed and had "carnal knowledge" of her, causing her pain. Later, her mother DAM (PW2) took her to Sori (Karungu) sub-district hospital where Leonard Omweri (PW4) a clinical officer attended to her. On examination, he found that she had a swelling on the vaginal valve and abdominal vaginal discharge. Laboratory tests revealed deposits of spermatozoa and pus cells.

3. At the plenary hearing of this second appeal in which our remit is limited to issues of law only, two issues took centre stage and turn out to be dispositive of the appeal.

4. The first is the manner in which the evidence of the only eye witness (PW1) was received by the trial court. The court record shows that after observing that the child was apparently aged 7 years, the trial magistrate noted;

> "I have examined the child and note that she does not understand the meaning of an oath but is intelligent enough to give an unsworn statement."

5. The court then received the unsworn evidence of PW1 who was then cross-examined by the appellant. In his first appeal, the appellant took issue with the manner in which the evidence of PW1 was taken by the trial court. In answer, the High Court held:

> "It is my considered view that it was improper for the trial court to allow cross-examination of the complainant when the evidence the subject of the cross-examination was an unsworn testimony. It follows therefore that though the complainant gave unsworn evidence and was thereafter cross-examined, there was no prejudice to the prosecution's case."

6. Section 19 of the *Oaths and Statutory Declarations Act*, is on evidence of children of tender years, and subsection (1) reads:

> "(1) 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* (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

7. This provision of the law has been the subject of judicial discussion. In *Johnson Muiruri vs Republic* [1983] KLR 445, this Court set out the procedure for carrying out a *voir dire* to be:

> 1. 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 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.
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> 2. 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.
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> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

8. Perhaps we should add that where, like here, the trial court is of the opinion that, although the child of tender years does not understand the nature of an oath, is nevertheless possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth, the court ought to state on record why it is persuaded that the child is of sufficient intelligence and, in addition, understands the duty of speaking the truth. Of course, the court should record the questions it asked the child and the answers in response to demonstrate the sufficiency of intelligence and the understanding of her duty of telling the truth.

9. As to the importance of recording the questions and response verbatim, this Court in *Godfrey Oluoch Ochuodho vs Republic* [2019] eKLR stated:

> " It has been held by this Court that it is not necessary for the trial court to record the questions posed to the minor, as the answers in response are sufficient. Nonetheless, it is good practice for the trial court to record the questions and responses verbatim for the benefit of the appellate courts. This was held in *Patrick Kathurima vs Republic* [2015] eKLR;
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> ' It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Compell (Times) December 20, 1982 and *Republic versus Lalkhan* [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.

10. The conviction of the appellant was substantially based on the sole eye witness account of the minor whose testimony was affirmed by the High Court. In doing so, the two courts below would be acting within the provisions of section 124 of the *Evidence Act*;

> " 124. Corroboration required in criminal cases.
>
> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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."

11. For the conviction to be safe, the evidence of PW1 needs to pass two tests: that it was properly received; and that it is cogent and truthful.

12. A failure by the trial court is that it did not record the questions it may have posed to PW1 and her responses, neither in verbatim nor at all. It is therefore not possible for this court or even the first appellate court to assess whether the trial court's conclusion that the child was intelligent enough to testify was well anchored. Yet that lapse alone could be overlooked. More troubling was that before receiving the child's evidence, the trial court needed also to satisfy itself that although the child did not understand the nature of an oath, still she understood the duty of speaking the truth. This second and disjunctive requirement is essential because the evidence of such a minor who, although intelligent enough to testify, should not be received if the minor does not understand the duty of speaking the truth. The statutory requirement that the court must satisfy itself that the child understands the duty of speaking the truth is not idle because if the minor does not understand the importance of telling the truth, then how will the minor be trusted to give truthful testimony?

13. In the matter at hand, the minor was cross-examined and it can be argued that the unsworn testimony was tested for veracity. First, we observe that the High Court's holding that the minor should not have been subjected to cross-examination because she gave unsworn evidence was erroneous. Save where there is an express statutory bar to cross-examination of unsworn testimony, like where an accused gives an unsworn statement in defence, the right to cross-examine a witness, which is a tenet of the right to fair hearing (article 50(2)(k) of the *Constitution*) and preserved, in criminal proceedings, under section 208 of the *Criminal Procedure Code*, applies to all witnesses who testify, including children of tender years who give unsworn evidence. (See *H.O.W v Republic* [2014] eKLR). Back to this matter. The record shows that PW1 stood firm and was unshaken when fielding questions under cross-examination. This speaks positively to the credibility of her testimony and in a way ameliorates the effect of the botched-up *voir dire* proceedings.

14. Yet there was another unsettling aspect of the proceedings. It is in the manner in which the testimony of the critical witness was recorded. PW1 is recorded to have said:

> " He put me on a bed and had carnal knowledge of me."

In cross-examination, she states:

> " There are houses too close to where you raped me."

15. At plenary hearing, Ms Odumba learned counsel appearing for the respondent conceded that it would be unlikely that the vocabulary of a child aged 7 years (who does not even understand the meaning of an oath) would include such words as 'carnal knowledge' or 'rape'. The appellant stood trial on a charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The statute assigns a technical meaning to the offense of defilement. It is the act which causes penetration with a child. Penetration being the partial or complete insertion of the genital organs of a person into the genital organs of another person (section 2).

16. The significance of recording the evidence of the victim in the actual words used in testimony is to establish whether the ingredients required by law for the offence have been proved. This Court observed in *Godfrey Oluoch Ochuodho vs Republic* (*supra*) thus:

> " We think with respect that, a child, cannot possibly know the meaning of the word 'sodomize', yet the record reflects that both of them used the same word, a technical term really, in their testimonies. The record does not indicate whether the trial magistrate sought

for clarification on the finer details of what the complainants thought the term meant, if at all they used it, in order to ascertain the minors used the term appropriately and accurately to mean that the appellant penetrated them in the anus. Actual penetration is the primary ingredient required by law for a successful conviction. From the record, the testimonies of the complainants were not cogent in so far as they did not clearly show that the appellant actually caused his penis to penetrate them in the anus as he was charged."

17. Taken in the context of the *Sexual Offences Act*, the words 'carnal knowledge' or 'rape', without more, are insufficient to prove penetration.

18. In the end, the conviction is dogged by at least three lapses, which if considered separately may not be decisive, but whose cumulative effect renders it unsafe. The failure is not because evidence may not have been available but because of the manner in which the evidence of the critical witness was received and recorded. This sad and harsh outcome, which we reluctantly accept, results from lack of diligence on the part of the trial court.

19. We have reflected on whether we should remit this matter for a fresh trial of the appellant but have reached a contrary conclusion. The victim was allegedly sexually assaulted 15 years ago. One would hope that those 15 years have brought some healing to the victim of the trauma caused by the act, and it would not be in her interest to make her relive the horror by asking her to testify afresh.

20. The upshot is that the appeal on conviction succeeds and the conviction entered on January 30, 2011 is hereby quashed and the sentence imposed on even date set aside. The appellant is hereby set at liberty unless held for any other just cause.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR