IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 11 OF 2018

BETWEEN

JOSHUA KATHOKA MALUKI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a Judgment of the High Court at Garissa (Dulu, J.) dated 30th *June, 2015 in H.C.CR.A 133 OF 2013)*

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JUDGMENT OF THE COURT

The High Court, (Dulu, J.) dismissed the appellant's first appeal and upheld his conviction on two counts of defilement of two female children and sentence to life imprisonment.

He now comes to this Court by way of a second appeal to challenge that dismissal on the grounds that the learned Judge erred in law by failing to observe that medical evidence did not prove that he had committed the offence, sentencing him to life imprisonment term in violation of the Constitution since he was a minor; failing to consider that the *voire dire* was not conducted in the correct manner; failing to find that the charges against him were defective; and imposing a mandatory sentence contrary to the Constitution.

The appellant, appearing in person, relied fully on his written submissions and found no purpose to make oral highlight. He submitted on the first ground that the prosecution failed to prove its case to the required standard, medical evidence being inconclusive that he had committed the offence; and that in order to link him to the offence, the prosecution ought to have invoked **section 36(1)** of the Sexual Offences Act to subject him to a DNA test.

On ground two, the appellant maintained that during plea taking, he had informed the trial court that he was 15 years old and that he was in primary school; that subsequently, the prosecution brought this issue to the attention of the trial court which ordered that he be interviewed by the probation officer; that though the prosecutor informed the court that he was not a minor, that statement was not backed by a report; and that in any case, he was never taken for age assessment as ordered by the trial court.

Relying on **Article 37(b**) of the Convention on the Rights of the Child and the South African case of **DPP Kwa Zulu Natal V. P** (2006) 1 SACR 243 (SCA), it was his position that his detention, being a child, must only be as a measure of last resort and for the shortest appropriate period of time; and that he ought to have been sentenced under the Children's Act.

V*oire dire* examination of the two victims, according to the appellant, was improperly conducted and went against the guidelines enumerated in **Johnson Muiruri V. Republic**, (1983) KLR 455; **Joseph Opando V R**, Criminal Appeal No. 91 of 1999; and **R V. Lal Khan** (1981) 73 Cr. App R 190.

On the defect of the charge sheet, the appellant argued that since it was the prosecution case that the complainants were his nieces, the charges ought to have been brought under **section 20(1)** of the Sexual Offences Act, and he should have been charged with the offence of incest instead of defilement under **section 8(1)** as read with **section 8(2)** of the Act; that unlike incest, defilement carries mandatory maximum sentences; that had he been charged with incest, the courts below would have had the discretion to impose a sentence of any term between 10 years and life imprisonment. He relied on **M.K V Republic**, Criminal Appeal No. 248 of 2014 to support this statement.

Lastly, relying on the decision of the Supreme Court in the now famous **Francis Karioko Muruatetu & Anor V. Republic**, Petition No, 15 & 16 of 2015, the appellant urged us to apply the principles in that decision and to emphasize that the mandatory maximum sentences are

contrary to the Constitution. The appellant noted that, although the learned Judge was sympathetic to him on the issue of sentence, he failed to substitute the charges with the offence under **section 20 (1)** of the Sexual Offences Act.

Miss Wangele, learned Counsel for the respondent, opposed the appeal and submitted that all the elements of the offence of defilement under **section 8(1)** and **8(2)** of the Sexual Offences Act, namely age of the victim, penetration and identification of the offender were proved beyond any reasonable doubt; that it was proved that the complainants were 8 and 6 years old, respectively; that they were penetrated by a person known to them, was similarly not in doubt from their testimony and on medical evidence.

On the appellant's contention that he was a child at the time the offence is said to have been committed, counsel submitted that the trial magistrate was satisfied by the evidence before him that the appellant was an adult. She also denied that *voire dir*e examination was not properly administered; that the trial magistrate, though persuaded that both complainants understood the nature of the oath failed to record that fact; and that that lapse notwithstanding no prejudice was shown to have been occasioned the appellant since the two minors were after all sworn and cross – examined on their evidence.

In conclusion, counsel submitted that the circumstances of **Muruatetu** (supra) did not apply to the facts in this case because the complainants here were children of tender years and that the appellant being their uncle took advantage of that relationship to destroy their childhood with long lasting effect on them.

By the provisions of section **361 (1)** of the Criminal Procedure Code we are expected to consider only issues of law in this appeal. Where the two courts below have made concurrent findings of fact, we are required to respect those findings unless the conclusions are not supported by the evidence or are based on a misapplication of the evidence. See: **M'Riungu V. Republic, (**1983) KLR 455, where this Court explained this edict as follows**:**

> **"Where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".**

In our estimation the submissions summarized in the foregoing paragraphs raise four issues of law: whether the charge sheet was defective; whether the appellant himself was a child at the time of commission of the offence; whether the *voir dire* examination was properly conducted; and whether the prosecution proved its case beyond reasonable doubt.

We confirm at the outset that the issue concerning the defect of the charge sheet is being raised for the first time before us. By this very fact, the two courts below have been denied a chance to express their positions, one way or another, on the matter. It is cardinal in a trial that parties present all their cases so that on appeal only grounds arising from the evidence and upon which the trial court or possibly the first appellate court have considered and expressed opinion can be raised. Of course, if a matter is raised at the trial and the trial court does not determine it, it may be made the subject of an appeal.

On this we shall be guided by our own Rule 72 which directs that;

> **"72. At the hearing of an appeal—**
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> > **(a) the appellant shall not, without the leave of the Court, argue any ground of appeal not specified in the memorandum of appeal or in any supplementary memorandum lodged under rule 65"**

This ground was an ambush not only to the respondent but to the court also. It was not pleaded before the High Court, the parties did not address the court on it and more importantly both the trial magistrate and the Judge in the High Court did not pronounce their opinion on it. Had we allowed and heard arguments from both sides, we would have had a basis to consider this ground. That approach is permitted by **Rule 104(c)** in civil appeals, which discretion we believe is available in criminal appeals. As it is we do not have the benefit of respondent's position on the matter. We reject the invitation to determine the question of the defect in the charge sheet.

The next ground of appeal is in respect of the appellant's age at the time he was alleged to have committed the offence. The appellant throughout the proceedings up to this stage has maintained that he was 15 years of age for which reason he ought to have been treated as a child offender under the Children's Act. During mitigation before the trial court, the learned Magistrate expressed himself as follows:

> **"Offence is serious and a deterrent sentence is appropriate. The accused not only defiled 2 minors aged less than 10 years, he also infected them with sexually transmitted diseases. The accused person was found to be an adult during the 1st pre bail inquiry…"**

On appeal the High Court stated as follows:

> **The appellant has also complained that his age was below 18 years at the time he was tried. The offence occurred in February 2012. The trial was conducted in 2012 and 2013 and judgment delivered on 20th July 2013. Before sentencing, a probation report was filed stating that the appellant was 19 years. There is no record that the appellant asked for age assessment at the trial. There has been no request on appeal for the age of the appellant to be assessed. In my view the appellant would not be treated as a minor at the time of sentencing because his age was above 18 years as at the time the offence was allegedly committed."**

Both courts appear to have based their conclusion that the appellant was an adult on a pre-bond report prepared by the Probation Officer and the Children's Officer. During the mention of the matter on the scheduled date, the Probation Officer confirmed that it had been established that the appellant was an adult. Though that report is not included in the record before us, we have taken the liberty to peruse the original record of High Court. We have seen the probation report No. PS/KYUSO/PRI/089 prepared by one Jennifer Matuu, the probation officer in Kyuso. In the report she indicates that the appellant was born in 1992 and was therefore 19 years in 2012 when the offence was committed; that he attended Kyamalutu Primary School up to standard 5 where he dropped out of school due to poor performance and truancy. This information, according to the report, was supplied by the appellant himself, his mother, the complainants' parents, the area chief and assistant chief. The report also states that the appellant was not a first offender; and that he was not in school as he claimed.

Apart from medical evidence it is now established that in determining the age of a child, the courts will consider, the child's birth certificate, the parents' or guardians' evidence proving the date of birth See **Mwalango Chichoro Mwanjembe V. Republic**, Mombasa Criminal Appeal No. 24 of 2015.

Basing their opinion on the report, both courts below were in no doubt that the appellant was an adult. That is a finding of fact with which we cannot interfere unless, as we have stated earlier, we find it was not supported by the evidence or is based on a misapplication of the evidence. We note, however, that the conclusion that the appellant was an adult having been reached, the trial magistrate strangely and *suo moto* ordered that the appellant's age be assessed after the close of the defence. The matter was not pursued conclusively thereafter and no other report was availed even after several adjournments for this evidence to be presented. The trial magistrate had to rely on the pre-bail report being the only evidence before him. Similarly, the learned Judge upon analysis of the evidence in this regard was convinced that the appellant was above 18 years when the offence was alleged to have been committed.

The issue of age was raised by the appellant himself. By the provisions of **sections 109** and **111** of the Evidence Act, if he was not satisfied with the report showing that he was an adult, it was his burden, without shifting it, to show that, as a matter of fact he was a child at time material in this case.

This ground must therefore similarly fail.

This Court in Malindi Cr. Appeal No. 68 of 2015 in the case of **Maripett Loonkomok V R**. (2016) eKLR laid down quite extensively the procedure of *voir dire*. It bears repeating those principles here *in extenso*. Not in all cases that *voir dire* is not administered or is not administered properly the trial would be vitiated. The effect of failure or omission will depend on the peculiar circumstances and particular facts of each case; that **section 19** of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years; 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 if, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth; that so long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under **section 233** of the Criminal Procedure Code. Both the Code and the Oaths and Statutory Declarations Act do not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or to test his or her ability to understand the duty of speaking the truth. The attempt to define the procedure of testing the intelligence of a child or ability to speak the truth was made in the landmark English case of **The King V. Brasier** (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, a case, like the one before us, involving sexual assault on a girl under 7 years of age. In the case, the twelve Judges stated, in part, that;

> **"…an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence".**

The past practice, for example in **Johnson Muiruri V. R** (1983) KLR 447 and others where the courts insisted that *voir dire* examination must be in the form of adialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim appears to have been abandoned. Courts today accept both the question and answer format and the recording of the child's answers only. What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of **sections 208** and **302** of the Criminal Procedure Code, the law allows cross-examination of a witness, including a child who does not give evidence on oath. See **Nicholas Mutua Wambua and another V. R** Msa Criminal Appeal No.373 of 2006.

It is common factor in this case that *voire dire* examination was conducted. The only grievance is that the learned Magistrate did not record whether the complainants were possessed of sufficient intelligence or whether he was satisfied that they understood the nature of the oath and the importance of telling the truth.

From the record, the complainants simply told the trial Magistrate as follows:

> "**PW1**
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> **I am MM1. I go to school at [Particulars withheld] Primary School. I am in standard 2. I am 8 years. I go to Church at Karoli. I will tell the truth.**
>
> **….**
>
> **PW2**
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> **I am MM2. I go to school at [Particulars withheld] Primary School. I am in standard 1. I am six years I go to Church at Karoli church. I will tell the truth."**

After this, and without expressing his opinion on what the complainants said above, the magistrate directed that both to give sworn evidence. By taking that course and from the above responses, it is apparent that the magistrate set out to ascertain whether the complainants were possessed of sufficient intelligence and whether they understood the responsibility to tell the truth but failed to go the whole way, an infraction that cannot vitiate the trial since, in any event the complainants gave sworn evidence and were cross examined by the appellant.

Though by **section 146** of the Evidence Act no corroboration was required as the trial magistrate was satisfied that the complainants were truthful witnesses, medical evidence buttressed their evidence. The learned Judge found as much and we cannot fault his conclusion on this point. We dismiss this ground too.

The main question is whether the prosecution brought evidence to the standard required to prove defilement. The appellant has argued that there was no conclusive evidence linking him to the offence without a DNA examination. From the record, both courts below analyzed the evidence before them and were satisfied that all the elements of the offence of defilement were demonstrated to exist.

The ages of the complainants were determined to have been 6 years and 8 years respectively. Through medical evidence the element of penetration was proved; and on identification, it was conceded that the appellant was well known to the complainants being their uncle and; that he lived with them.

On the issue of DNA, quite apart from the fact that it was not canvassed before both courts below, it would have been superfluous in light of the overwhelming evidence against the appellant.

On sentence, with respect, we agree with counsel for the respondent that, in view of the ages of the victims and considering the fact that the appellant was entrusted to take care of them as their uncle, the appellant cannot benefit from the decision of the Supreme Court in **Francis Karioko Muruatetu & Anor V. Republic**, Petition No, 15 & 16 of 2015.

In the end, this appeal is bereft of merit and is accordingly dismissed.

Dated and delivered at Nairobi this 21st day of February, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR