



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OKWENGU & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 12 OF 2018

BETWEEN

MARTIN MATI SYUKI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at

Garissa (Dulu, J.) dated 19th February, 2015).

in

(H.C.Cr.A. No. 48 of 2013)

JUDGMENT OF THE COURT

[1] The appellant herein was arraigned before the Senior Resident Magistrate Court at Mwingi for the offence of defilement contrary to **Section 8(1)** of the **Sexual Offences Act**, as read with **Section 8(2)** of the same Act. He was alleged to have penetrated the vagina of BM (name withheld), a girl aged 3½ years. He was tried, convicted of the offence, and sentenced to serve life imprisonment.

[2] The appellant who was aggrieved, appealed to the High Court challenging his conviction on ten grounds. The grounds included the contention that the minor was not subjected to *voire dire* examination before testifying; that the evidence against the appellant was riddled with contradiction and inconsistencies; that the doctor's report was irregularly produced in evidence; and that the rights of the appellant under **section 211** of the **Criminal Procedure Code** were not explained to him.

[3] The learned Judge of the High Court (**Dulu, J.**), after re-evaluating and analyzing the evidence on record, found that the evidence as tendered by the prosecution proved beyond reasonable doubt that the appellant committed the offence, and that the sentence imposed upon the appellant was lawful. He therefore dismissed the appeal against both conviction and sentence.

[4] The appellant has now filed this second appeal. In his original memorandum of appeal, he challenged the judgment of the High Court on five grounds. The grounds essentially faults the learned Judge in failing to find that the failure by the trial magistrate to conduct a *voire dire* examination, rendered the trial irregular; in failing to re-evaluate the evidence afresh in order to arrive at its own independent conclusion; and in failing to find that the prosecution failed to prove its case to the required standard. On 20th August, 2018 the appellant filed supplementary grounds and written submissions.

[5] During the hearing of the appeal, the appellant who was in person relied on the supplementary grounds of appeal and the written submissions that he had filed on 20th August, 2018. In the supplementary grounds, the appellant added several grounds including the court failing: to evaluate the defence evidence alleging a grudge between the mother to the complainant and the appellant; to find that there was violation of **section 77** of the **Evidence Act**, **Section 197** and **200** of the **Criminal Procedure Code**; and upholding a harsh and disproportionate sentence.

[6] In the written submissions, the appellant submitted that he suffered injustice during the trial as he is illiterate and was not in a position to defend himself adequately. He faulted the two lower courts for failing to give due regard to his evidence concerning an alleged grudge between him and the complainant's mother. He questioned why he was not arrested immediately after the commission of the alleged offence, and why the complainant's mother tampered with the minor's clothing.

[7] The appellant cited **Maina vs. Republic [1970] EA 370**, for the proposition that it was unsafe to convict on the evidence of the complainant alone in sexual offences cases. He argued that the provision allowing the testimony of women and girls in sexual offences to be treated differently, was discriminatory, and contrary to the Constitution. He urged the Court that the requirement for corroboration in sexual offences affecting women and girls is unconstitutional, and that the Court should be guided by the credibility of the witnesses as required under **section 163(c)** of the Evidence Act.

[8] He wondered why he was not subjected to a medical examination, nor was any DNA examination done, or any evidence adduced to prove penetration, or any contact between him and the complainant. He dismissed the evidence regarding the broken hymen maintaining that even physical activities like playing or medical examination or use of a finger could lead to the same results. He also dismissed his purported identification by the complainant, contending that he was well acquainted with the complainant due to the nature of his work.

[9] As regards the *voire dire* examination, the appellant submitted that this was a statutory requirement, and the learned Judge was wrong in holding that the failure to carry out the examination did not cause prejudice to the appellant. Similarly, the appellant maintained that the failure to explain his rights to him under **section 211** of the CPC, which is a mandatory requirement, was another serious breach in the procedure. In addition, the appellant contended that **section 200** of the CPC was not complied with even though the case was fully heard by **V. A. Otieno**, a Resident Magistrate. Finally, the appellant contended that the sentence imposed upon him did not take into account the Supreme Court decision in **Karioko Muruatetu vs. Republic (Petition No. 15 of 2015)**.

[10] In response to the appellant's submissions, **Mr. Gitonga Muriuki**, learned Senior Principle Prosecuting Counsel (SPPC) made oral submissions urging the Court to dismiss the appeal. Counsel pointed out that the two main issues raised by the appellant were the failure to conduct a *voire dire* examination and failure by the first appellate court to re-evaluate the evidence. On the issue of *voire dire* examination, counsel conceded that the record showed that no *voire dire* examination was conducted, but agreed with the sentiments of the learned Judge of the High Court that the failure to conduct the examination did not prejudice the appellant. Counsel argued that the failure to conduct a *voire dire* examination on children of tender years does not vitiate the evidence presented by the prosecution, particularly where there is independent evidence of the mother to corroborate the minor's evidence. Counsel cited **Maripett Loonkomok vs. Republic, [2016] eKLR (Criminal Appeal No. 68 of 2015)** in support of this proposition.

[11] On the issue of whether the appellant was rightfully convicted, counsel submitted that the trial magistrate correctly analyzed the evidence, and noted that the elements of defilement were established as the minor's age was proved to be 3½ years; the appellant was properly identified by both the complainant and the mother to the complainant, as he was well known to them; and that penetration was proved through the evidence of the complainant, her mother and the medical evidence. Finally, in regard to the sentence, counsel maintained that the sentence imposed was appropriate.

[12] This being a second appeal, the Court's jurisdiction is limited to addressing matters of law only. As was stated by this Court in the case of **Karingo vs Republic [1982] KLR 213** at page 219:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari S/O Karanja versus Republic (1950) 17 EACA 146).”

[13] In our view, three main issues of law arise for consideration in this appeal. These are, the failure of the trial court to carry out a *voire dire* examination before taking the testimony of the minor, and the effect of such omission. Second is whether **section 211** and **200** of the CPC were violated, and if so, the effect on the proceedings; and finally, whether the learned Judge of the first appellate court properly evaluated and re-analyzed the evidence that was adduced in the trial court and came to the correct conclusion.

[14] We have perused the original record of the trial court and would dismiss the complaint of the appellant regarding the failure of the trial court to comply with **section 200** of the CPC, as the record shows that the evidence of all the witnesses was taken by a resident magistrate named as **V.A. Otieno**. The Coram for 29th February, 2012, indicates that the case was before **Mr. Nyaberi**, Principal Magistrate. However, the handwritten record shows that it was actually V. A. Otieno who heard the matter. As regards the failure to comply with **section 211**, the record is silent but we would agree with the learned Judge, that the appellant having given evidence on oath, it is apparent that his options must have been explained to him. Accordingly, we would dismiss this ground. [15] As regards the *voire dire* examination, the record supports the defence submission that the trial court did not carry out a *voire dire* examination. Indeed, this was conceded by the prosecuting counsel during the hearing in the first appellate court.

The question is, what is the consequence of such failure on the proceedings?

[16] The requirement for a *voire dire* examination is a statutory requirement provided under **section 19** of the **Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya**, for any witness who is a child of

tender years. In **Johnson Muiruri vs. Republic [1983] KLR 445** this Court held that:

*“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.”*

[17] In **Maripett Loonkomok v Republic** (supra), which was cited by the SPPC, this Court addressed a situation where the trial court failed to conduct a *voire dire* examination. In upholding the conviction, the Court stated as follows:

*“It follows from a long line of decisions that *voire dire* examination of 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 *voire dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction. See Athumani Ali Mwinnyi vs R, Criminal Appeal No. 11 of 2015.’*

*On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct *voire dire* examination. The complainant’s evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant’s evidence, the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence which corroborated the fact of defilement.”*

[18] In this case, the complainant’s mother testified that the complainant was 3½ years old at the time the offence was committed. She produced a birth certificate which confirmed that the complainant was born on 30th January, 2008. **Dr. Philemon Ogeto** who examined the complainant estimated her age at 3½ years. We therefore have no reason to depart from the concurrent findings made by the trial court and the first appellate court that the complainant was only 3½ years at the time the offence was committed. Needless to state that the complainant was a child of tender years, and *voire dire* examination was imperative.

[19] From the record of the trial court, it is clear that the trial court had difficulties taking the evidence of the complainant. On three occasions, the matter had to be adjourned, as the complainant was either too emotional or uncommunicative. The court observed that she required counselling. This was not surprising given her tender age. It is obvious that the complainant was totally vulnerable and the court ought to have applied **Article 50(7)** of the Constitution that provides for the use of an intermediary, where it is in the interest of justice to assist a complainant or an accused person who is vulnerable. An intermediary such as the mother or a counsellor or children’s officer, would have enabled the complainant to communicate with the court and also provide support to the complainant in that difficult task of testifying in court at her tender age.

[20] Without the *voire dire* examination having been done or an intermediary having been used, the evidence of the complainant cannot be relied upon. Although there was the evidence of the mother and the evidence of **Dr. Philemon Ogeto**, which appeared to confirm that the complainant was actually defiled, the evidence concerning the identity of the defiler, was only that of the complainant as the evidence of the complainant’s mother who identified the appellant, was from what she had been told by the complainant. That is to say that there is no other independent evidence that could be relied upon in regard to the identification of the appellant as the defiler, if the evidence of the complainant is disregarded.

[21] The admission by the appellant that he was working at the homestead was not necessarily an admission that he committed the offence. It was therefore not correct as held by the learned Judge, that the appellant did not suffer any prejudice from the failure by the learned magistrate to carry out a *voire dire* examination. The trial court totally relied on the evidence of the complainant in regard to identification without any other independent evidence and to this extent, the appellant’s position is distinguishable from the position in **Maripett Loonkomok v Republic** (supra). In the absence of a *voire dire* examination, reliance on the complainant’s evidence resulted in a miscarriage of justice, as the evidence adduced in the trial court fell short of establishing the charge against the appellant.

[22] In the circumstances, we find that the appellant’s conviction cannot stand. Accordingly, we allow the appeal, set aside the conviction and sentence. The appellant shall be set free unless otherwise lawfully held.

This judgment is delivered in accordance with Rule 32(2) of this Court’s Rules, **Karanja, JA** having declined to sign.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

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F. SICHALE

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar