IN THE COURT OF APPEAL

AT ELDORET

(CORAM: W. KARANJA, MUSINGA, & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 71 OF 2018

BETWEEN

REUBEN KISUCHA KAKAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Azangalala, J. in the High Court of Kenya at Eldoret, dated 27th October 2011

in

***CR. APP N0.100 of 2010*.)**

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JUDGMENT OF THE COURT

1. The appellant, **Reuben Kisucha Kakai**, was charged with the offence of defilement contrary to **section 8 (1)** as read with **8(2)** of **the Sexual Offences Act, No. 3 of 2006**. The appellant also faced an alternative charge of committing an indecent act contrary to **section 11(1)** of the same Act.

2. The particulars of the offence were that on the 26th September 2009 in Lugari District within Western Province, the appellant unlawfully and intentionally caused penetration with his genital organ namely, penis, into the genital organ namely, vagina, of a child, **JNW**, aged 4 years.

3. The prosecution called a total of 5 witnesses. PW1, **Peter Wenani**, a clinical officer in a local hospital, testified that on 26th September 2009, the complainant was taken to the hospital by her mother and some police officers. It was reported as a case of defilement. On examination of her vagina, he found blood stains on the victim's green whitish grey pant and skirt; the hymen was torn, and the vaginal tract was discharging blood. He concluded that there had been physical penetration of the vagina. He then proceeded to fill a P3 form on 27th September 2009.

4. PW2, the child, gave an unsworn statement. It was her testimony that on the material day she was sent by her mother to buy cooking oil when she met the appellant on the way. The appellant dragged her to a nearby bush, removed his trousers, blindfolded her with a handkerchief, removed her pants and slept on her. She felt pain and started bleeding. She identified the appellant as someone well known to her.

5. PW3, the mother of the complainant, testified that she had sent her daughter to go and buy cooking oil. When the child took long to return, she decided to go and look for her. She met the child on the way, crying. PW3 observed that the child was bleeding from her vagina. PW3 also saw the appellant running away from the scene. It was at that moment that she screamed and PW4, who heard the screams, followed up the appellant and accosted him. They took the appellant to Chiboi Administration Police (A.P.) Camp and proceeded to record a statement at Lumakanda Police Station. The child was later on taken to Lumakanda District Hospital. PW4 corroborated PW3's evidence in all material aspects.

6. In his defence, the appellant stated that on the material day at about 10.00 a.m., he was at his farm digging when a group of four men approached him. They held and beat him up for no apparent reason. He was then arrested and taken to Chiboi A.P Camp where he met a woman who claimed that he had defiled her child. He also alleged that he had lent the woman some Kshs 1000/= which she had refused to refund him. According to the appellant, he had been framed up.

7. The trial magistrate in convicting the appellant expressed himself as follows:

> ***"The evidence of DW1 is an afterthought. The court disbelieves it in toto. The court believes that PW2 properly identified DW1 as the person who defiled her on 26.9.09. PW2's evidence was equally corroborated by the evidence of PW1, PW3 and PW4 herein, so applies to P.E 1, 3 and***
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> ***4. The prosecution has therefore proved its case against the accused person beyond any reasonable doubt in the main charge…"***

The appellant was sentenced to life imprisonment.

8. Aggrieved by the conviction and life sentence meted upon him by the trial court, the appellant lodged a first appeal to the High Court. In dismissing the appeal, the learned judge made a finding that the prosecution proved its case as required in law and that the conviction was sound as it was based on facts and the relevant law.

9. Aggrieved by the two concurrent decisions, the appellant has now preferred this second appeal. In the instant appeal, the appellant filed a memorandum of appeal and subsequently, supplementary grounds of appeal filed on 21st May 2019, in which he listed 3 grounds. First, he faulted the learned judge for failing to note that no *voire dire* examination was conducted, and that was in contravention of ***section 19 (1)*** of the ***Oaths and Statutory Declarations Act***. Secondly, the appellant argued that the age of the complainant was not proved beyond reasonable doubt. Thirdly, the appellant contended that the learned judge erred by relying on the evidence of blood found in the clothes of the complainant.

10. The appeal was canvassed by way of written submissions. In his written submissions, the appellant contended that the learned magistrate failed to conduct a *voire dire* examination on the complainant and hence contravened the provisions of ***section 19 (1) of Oaths and Statutory Declarations Act***. According to him the evidence of the complainant was not properly received by the trial court and should not therefore have formed the basis of a conviction.

11. The appellant also argued that the baptismal card that PW3 allegedly adduced to verify the age of the complainant as 4 years did not appear on the record or proceedings, and furthermore, even if it existed, it was inconsistent with the P3 form on Section C which indicated the age of the complainant as 14 years. He further argued that the trial court overlooked the variance in the age, which in turn affected the sentence that was passed. He maintained that the minor's age was not proved beyond reasonable doubt.

12. Lastly, it was the appellant's submission that the blood stains found on both his clothes and the complainant's clothes were not subjected to tests to ascertain if indeed they matched or if they connected him to the crime. He urged this Court to allow the appeal, set aside the conviction and quash the sentence that was passed against him.

13. The State through Prosecution Counsel, **Brenda Kegehi**, opposed the appeal vide her written submissions dated 6th June 2019. Ms Kegehi asserted that the age of the complainant was proved by PW3 through the baptismal card. It was also reiterated that penetration was established by PW1 who conducted the medical examination as well as the evidence of PW2, PW3, and PW4. In addition, the respondent submitted that the appellant was positively identified by way of recognition as the appellant was well known to PW2, PW3 and PW4 as their neighbour. She concluded by stating that the appellant's defense was a mere denial and an afterthought and urged us to uphold the conviction and sentence.

14. We have considered the record of appeal as well as the submissions made by the appellant and the respondent. This being a second appeal, our mandate as provided under ***section 361*** of the ***Criminal Procedure Code*** is limited to a consideration of points of law, not facts. In ***Karingo v R [1982] KLR 213*** at p. 219, this Court expressed:

> ***"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 C/O Karanja - vs- R (1956) 17 EACA 146)."***

15. In our view, the three issues that arise for our determination are as follows:

a) Whether the ingredients of the offence of defilement were proved to the required standard;

b) Whether the absence of a *voire dire* examination was fatal to the prosecution case; and

c) Whether the age of the complainant was proved.

16. The appellant was charged with the offence of defilement. In ***John Mutua Munyoki v Republic [2017] eKLR***, this Court stated that under the Sexual Offences Act, the main elements of the offence of defilement are as follows:

> "(i) The victim must be a minor, and
>
> (ii) There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice."

17. In the circumstances of this case, the prosecution was therefore required to prove that the victim was below the age of 18 years at the time

of the commission of the offence; and that the appellant committed an act which caused penetration with a female person who to his knowledge was a minor.

18. From the record, the testimony of the complainant, PW2, was to the effect that on the material day her mother had sent her to buy cooking oil when she met the appellant, who forcefully defiled her. Further, the medical evidence of PW1, **Peter Wanani**, who examined the complainant found that there were blood stains on the complainant's grey pant and skirt, the hymen was torn, and blood was oozing from her vagina. He concluded that there was physical penetration. PW3, the mother of the child, also testified that she went to look for her daughter, who she had sent to buy cooking oil but had delayed in getting back to the house. She met with her crying and saw the appellant leaving the scene. She raised an alarm and PW4 who was nearby heard her screams and started chasing after the appellant. He managed to arrest him. PW4 corroborated the evidence.

19. Having made all these factual findings, we are satisfied that all the ingredients of the offence of defilement were present, and the trial court was satisfied beyond any reasonable doubt that the appellant was guilty as charged and convicted him accordingly.

20. The High Court also re-evaluated the prosecution evidence and concluded as follows:

> ***"The upshot of the foregoing is that I am satisfied that the prosecution proved its case as required in law. The conviction of the appellant was sound as it was based on fact and law. I have no hesitation in upholding the same. The appeal against conviction is accordingly dismissed."***

21. Based on the testimony of the prosecution witnesses, there is no doubt in our mind that the appellant was properly identified and placed at the scene of crime. Coupled with the recognition by the complainant herself and her mother and PW4, we are convinced that it is the appellant who defiled the child.

22. We now consider the issue of *voire dire* examination. It is the appellant's contention that the evidence of the complainant was not properly received by the trial court and should therefore not form the basis of a conviction. He faulted the trial court for improperly admitting the testimony of the complainant without administering a *voire dire* examination as required by the law.

23. The record confirms that the trial court did not conduct *voire dire* examination on the complainant. We also note that this issue was not raised before the first appellate court. The basis of subjecting a child of tender years to *voire dire* examination is found in ***section 125(1)*** of the ***Evidence Act*** which provides as follows:

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."***

24. ***Section 19*** of the ***Oaths and Statutory Declarations***

Act provides that:

> ***"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."***

25. In ***Peter Kariga Kiune v Republic***, ***Criminal Appeal No 77 of 1982*** *(unreported)* this Court 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 event 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."***

26. Going by that passage, is the failure by the trial court to conduct a *voire dire* examination on a minor fatal to the prosecution case?

In ***Maripett Loonkomok v Republic*** ***[2016] eKLR***, this Court stated as follows: -

> ***"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 reiterated 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…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. See Athumani Ali Mwinyi v R Cr. Appeal No. 11 of 2015.'"*** [Emphasis supplied].

27. Most recently, this Court in ***CMM v Republic [2020] eKLR*** held a similar view, that:

> ***"In the circumstances of this case based on the totality of the evidence adduced by the prosecution, we find that notwithstanding that voire dire examination of the complainant was not conducted, that did not vitiate the prosecution case as there was sufficient independent evidence to support the charge against the appellant."***

28. It therefore follows from the above decisions that *voire dire* examination of a child witness must be conducted, but failure to do so does not vitiate the entire prosecution case. Of significant importance is that there was ample and sufficient independent prosecution evidence to support the charge against the appellant. This ground of appeal must therefore fail.

29. On the issue of age of the child, the appellant contended that even though PW2 and PW3 stated that the complainant's age was 4 years, the baptismal card produced by PW3 was never produced in court. Further, that the P3 form under Section C indicated that the **"estimated age of the person examined is 14 years**.**"** According to the appellant, the trial court erred by believing that the minor was 4 years old, which was inconsistent with what was on record on Section C of the P3 Form. The appellant maintained that the victim's demeanor was not that of a minor.

30. A cursory glance at the trial court proceedings indicates that PW1 testified that he filled a **"P3 Form for JN aged 4 years old**." PW3, the mother of the child, also testified that the complainant was 4 years old and produced a baptismal card dated 28.08.2005 marked PMFI 5. The P3 form alluded to by the appellant indicates in part 1 that the age is 4 years. On **page 36**, Section b of the same form, the name of the complainant and the age clearly shows 4 years.

31. On Section C, it is true that the estimated age of the person examined was indicated as 14 years. In our view, it is not uncommon that the 14 years could have been an error. It is evident that the age of 4 years was consistent all through the trial. A variation or inconsistency in one document should not be fatal to the case and in any case, it would be curable under ***section 382*** of the ***Criminal Procedure Code***.

32. This Court in ***Joseph Maina Mwangi vs. Republic, Criminal Appeal No. 73 of 1993*** **(ur)** stated as follows:

> ***"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences."***

33. Furthermore, the trial Magistrate had the opportunity to observe the demeanor of the child and on the basis of evidence before him stated:

> ***"The court looked at the demeanor of PW2 herein, she is a child of tender years. It took the court two hours to get the evidence of PW2. She was scared of the court environment…"***

34. We think that any reasonable person would be able to distinguish between a 4 year old and a 14 year old child. We find that the variance in the age as indicated on the documents is minor and immaterial and curable under ***section 382*** of the ***Criminal Procedure Code***.

35. Lastly, it is important that we address the issue of the sentence. The appellant was sentenced to life imprisonment as provided for under ***section 8 (2) of the Sexual Offences Act No. 3 of 2006***. From the proceedings, the trial court considered the mitigation of the appellant. On page 29 of the record, the learned magistrate observed:

> ***"The accused person is a first offender. He is remorseful. The court notes that the offense carries a life imprisonment sentence. The court however calls for a P.0.R before sentencing the accused person on 3.6.2010."***

36. The learned magistrate went on further to order as follows: -

> ***"The Probation Officer's report is favourable to the accused person. However, the court notes that Section 8 (2) of the Sexual Offences Act provides a mandatory sentence of life imprisonment. The Probation Officer's report is to assist the accused person in the event that he opts to challenge the conviction and sentence in the appellate court."***

37. We are cognizant of and bound by the dicta of the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic, SC Petition No. 16 of 2015*** on the constitutionality of mandatory sentences.

38. This Court in ***Christopher Ochieng v R [2018] eKLR, Kisumu Criminal Appeal No. 202 of 2011*** stated: -

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be***

considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v-Republic *(supra)****, we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."***

39. The general rule in sentencing is that each case should be looked at in its peculiar circumstances and character. There is no doubt that the offence committed by the appellant was heinous and has caused severe trauma to the young child. Having taken into account the mitigation and even though the Probation Officer's report, we are satisfied that the sentence that was passed by the trial court and affirmed by the High Court is a lawful one and appropriate in the circumstances of the case. There is no basis of interfering with it.

40. Consequently, we find this appeal lacking in merit and dismiss it in its entirety. It is so ordered.

Dated and delivered at Nairobi this 25th of September, 2020.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

……..……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR