IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CRIMINAL APPEAL NO. 24 OF 2018

BETWEEN

JAPHETH MWAMBIRE MBITHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi

(Chitembwe J.) delivered on 22nd September, 2016

in

Criminal Appeal No. 86 of 2013)

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JUDGMENT OF THE COURT

[1] Japheth Mwambire Mbitha (appellant) has preferred this second appeal against a conviction for the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. As far as this appeal is concerned our jurisdiction is circumscribed under ***Section 361 (1) (a)*** of the ***Criminal Procedure Code*** to only matters of law. In ***Karani vs. R*** **[2010] 1 KLR 73** this Court stated as follows:

> ***"This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such*** *omission or commission would be treated as matters of law."*

[2] In brief, the facts that gave rise this appeal were that on 18th November, 2012, FO (name withheld, a complainant who testified as PW2) was a 12 year old girl at the material time. FO had gone out on an errand to buy vegetables. At the time, she and her sister lived with their uncle and aunt in [Particulars Withheld]. As she was running home on her way back from the errand, one of her shoes fell off. When she went to retrieve it, she realized that the appellant, who was a neighbour, had taken it and placed it behind his door. When FO asked the appellant about the missing shoe, he grabbed her by the neck and forced her into his house. He then pushed her on the bed, took off his clothes, put on a condom and proceeded to defile her. When FO attempted to scream the appellant hit her on the back of her neck and threatened her with dire consequences should she continue interrupting him. Luckily, FO 's screams had already alerted her sister JA (PW 3) who was at home which happened to be nearby.

[3] Responding to the distress call, PW 3 went and knocked on the appellant's door and opened it. Alarmed, the appellant disengaged from FO and went to check on the intruder. He came out of the house clad in just his boxer briefs and on encountering PW 3, threatened to beat her with a stick for meddling in his affairs. Undeterred by the threats and spurred by her sister's pleas for help, PW 3 rushed into the house where she found FO still crying in aguish and accusing the appellant of rape. PW 3 then rushed and reported the matter to their uncle who came and was on the verge of beating up the appellant when neighbours intervened and advised him to report the matter to the police instead.

[4] That is how the appellant was apprehended and handed over to the Kanu Police Station. Investigations were carried out by Inspector Daniel Kailu (PW 4) who based on FO 's account and the victims medical evidence, was convinced that the complainant was indeed defiled as alleged. According to Ibrahim Abdillahi (PW 1), a clinician at Malindi Hospital, the complainant was examined and found to have been

defiled by a person known to her. On the strength of this evidence, PW 4 had the appellant arraigned in court and charged with the offence of defilement contrary to Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence being that:

> ***'On 18th November, 2012 in Magarini District within Kilifi County, intentionally caused his penis to penetrate the vagina of F A a child aged 13 years.'***

The appellant also faced an alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

[5] The appellant denied the charges and upon hearing the prosecution's case, the learned trial magistrate, Gicheha (SPM), found he had a case to answer and put him on his defense. The appellant opted to give an unsworn statement of defence and did not call any witness. In his defence he stated that he was set up in order to settle scores by a former friend of his. He stated that on 20th November, 2013 he was with his then friend, one Nauzi Oluoch. They went to drink with his friend's girlfriend. They later had a dispute and started fighting. He managed to beat his friend. His friend told him that he would revenge. On the 30th November, 2013 while at his place of work, he was called to the office by the company guards. He found police officers and was taken to Marereni police station and later charged with offences he knew nothing about.

[6] The learned magistrate was however not satisfied by the said defence which in her view did not dent the prosecution's evidence and in a reserved judgment she found the appellant guilty as charged and sentenced him to serve a term of 20 years imprisonment. Aggrieved by that outcome, the appellant lodged a first appeal at the High court, which was dismissed vide the judgment delivered on 22nd September, 2016; wherein Chitembwe J., upheld the trial court's findings.

[7] Unrelenting, the appellant is before this Court on second appeal, which is predicated on the grounds that the learned first appellate Judge erred by; upholding a sentence premised on a defective charge sheet; failing to consider that the trial court based its findings on the testimony of PW 2 and PW 3 which was inadmissible and ought to have been totally disregarded; failing to find that the medical evidence did not support the charge at hand; failing to find that the investigations were shoddy and in breach of section 109 of the Evidence Act and lastly; that the learned Judge failed to consider the appellant's defence.

[8] During the plenary hearing, the appellant who was appearing in person, urged the appeal through his written submissions. He began by stating that the charge sheet was defective as it failed to mention that the act done was unlawful. To the appellant, that omission was fatal and could not be cured under Section 382 of the Criminal Procedure Code. As regards the admissibility of PW 2 and PW 3's testimony, the appellant submitted that the trial court failed to conduct *voir dire* examination on the two witnesses prior to allowing them to testify. Further, that the trial magistrate failed to indicate the questions asked in the *voir dire* examination and as such, that it could safely be inferred that no *voir dire* examination took place. On this, the appellant was emphatic that in sexual assault cases, *voir dire* examination of any minors who testify is critical in order to ensure the veracity of their testimony.

[9] The appellant also challenged reliance placed on the medical evidence on the basis that the complainant was taken to hospital days after the alleged defilement and the conclusions by PW 1 failed to indicate whether the assault was by a male organ or by any other object. Further, that as per the medical evidence, it was equally unclear whether the assault was linked to the appellant. He asserted that courts of law do not operate on mere suspicions and speculation, but are guided by evidence, bearing in mind that the burden is always with the prosecution to prove its case beyond reasonable doubt. Given the above, the appellant submitted, the evidence was far from sufficient to sustain a conviction as not only was it far from water tight, but the prosecution relied on inconsistent witnesses. In particular he isolated the testimony of PW 1 and that of the Investigating officer (PW 4) which in his view was contradictory. In view of the foregoing, he urged us to allow the appeal and set aside the conviction and sentence.

[10] Opposing the appeal was Senior Prosecution Counsel Mr. Isaboke who contended that the appellant was arrested at the scene in almost *fraglante delicto* circumstances and that the testimony of the witnesses was not challenged. Further, that the P3 form produced in evidence confirmed that the complainant had been defiled and since all this testimony was uncontroverted, the conviction was safe and the appeal should be dismissed.

[11] Having considered the record, the parties' respective submissions and the law, the issues that are discernable for our determination are twofold;

a) whether the first appellate court erred by failing to find that the conviction was premised on a defective charge sheet and;

b) whether the first appellate court upheld a conviction that was based on unreliable, contradictory and inadmissible evidence

[12] On the first issue, the question of a defective charge sheet was not among the grounds raised on first appeal let alone during the trial. This issue has been raised for the first time in this second appeal. This Court when faced with a similar issue in ***Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009*;** held as follows:

> ***"…the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."***

Needless to say, the Court declined to entertain fresh issues on appeal. In line with that finding, we too are disinclined to address the allegations of a defective charge sheet as it is a new matter and there is no opinion by the two courts below on this new issue which was introduced for the first time on second appeal. Put differently, the appellant cannot fault the first appellate court for failing to make a finding on an issue that was never advanced at the hearing of the first appeal. Consequently, that ground of appeal should of necessity fail.

[13] As regards the second issue, the appellant has contended that the evidence placed before the trial court was not only contradictory, but that no *voir dire* examination was ever conducted on the minors (PW 2 and PW 3). *Voir dire* examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See **Duhaime, Lloyd**. "***Voir Dire* definition" Duhaime's Legal Dictionary**). With specific regard to the testimony of children, *voir dire* examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of *voir dire* was explained by this court in **Johnson Muiruri vs Republic [1983] KLR 445** as follows:

> ***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 voire 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.***
>
> ***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.***
>
> ***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."***

[14] In this case, a perusal of the record reveals that prior to receiving the respective testimonies of PW 2 and PW 3, the learned trial magistrate went on an enquiry of whether each of the witnesses understood the meaning of telling the truth and the consequences of lying. Having satisfied herself that the two minors understood the importance of telling the truth, the court went on to record their evidence. No objection was ever raised by the appellant regarding the *voir dire* examination or the subsequent admission of the minors' testimony. Again, it bears repeating that the purpose of *voir dire* is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on each of the two witnesses; to which the two minors even indicated to the court that failure to tell the truth renders a liar ineligible to go to heaven.

[15] Having satisfied herself that the two minor witnesses understood the import of speaking the truth in court and the consequences of lying, the trial magistrate then admitted their evidence and from the record, we see no reason to interfere with that finding. The evidence of FO and PW 3 was admitted within the confined of the law on *voir dire* examination. Despite the appellants' allegations that there were material contradictions in the witness testimony, he never demonstrated or pointed out the alleged inconsistencies. To the contrary, the testimony rendered by FO was highly consistent and corroborated by PW 3.

[16] Lastly, as regards the medical evidence, the appellant was of the view that the same did nothing to prove that the penetration was by a male organ and/or that he was the perpetrator of the offence. However, as rightly pointed out by Mr. Isaboke, the learned prosecution counsel, the appellant was apprehended at the scene by PW 2's uncle and neighbours. This much was attested to by both FO and PW 3. Not only that, at the time when PW 3 responded to FO's distress calls, she found PW 2 in the appellant's house, crying and accusing the appellant of rape. At the same time, it is to be remembered, that at the time, the appellant was only clad in nothing but his boxer briefs. This set of facts is indeed highly incompatible with the innocence of the appellant and incapable of any other explanation other than that of his guilt.

[17] The entire evidence taken alongside the medical report left no doubt at all that FO was indeed defiled. The medical report had findings of a broken hymen, the testimony of FO was that at the time of the defilement, the appellant had worn a condom. Naturally therefore, the most that the medical report would reveal in such circumstances is an act of the defilement which it did. The identification of the perpetrator was left to the testimony of FO and PW 3 who, as afore stated, gave clear and cogent account as to what transpired.

[18] On the whole therefore, we find this appeal is without merit, it is therefore dismissed with the result that we affirm the decision of the two courts below.

Dated and delivered at Mombasa this 4th day of April, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR