



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CRIMINAL APPEAL NO. 104 OF 2015

BETWEEN

PHILIP OCHIENG MWERESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kitale, (J. R. Karanja, J) dated the 28th July, 2012

in

H.C.C.R.A. NO. 56 OF 2010)

JUDGMENT OF THE COURT

Background

[1] This is a second appeal by **Philip Ochieng Mweresa, (the appellant)**, following the dismissal of his appeal by the High Court against his conviction and sentence by the Chief Magistrate's Court at Kitale, for the offence of defilement contrary to **Section 8 (1) as read together with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya**.

[2] The particulars of the charge against the appellant were that on 20th April, 2009 in Trans Nzoia West District within the Rift Valley Province by the use of his genital organ, namely penis, he caused penetration to the genital organ, namely vagina of the complainant, **FO** (name withheld) a child aged 3 years.

[3] During the trial, the prosecution called four (4) witnesses including the minor complainant (the complainant), her mother **HM (H)**, the clinical officer, **Chrisantus Masinde (Masinde)**, and Police Constable **Jillo wario (PC Wario)** who was the Investigating Officer.

[4] The evidence was that on 20th April, 2009, **H** went to her place of work at [Particulars withheld], where she worked with the appellant and three other colleagues; that she was accompanied by her three (3) daughters, including the complainant who was three (3) years old; that her daughters left the hotel at 2 pm and shortly thereafter she saw the complainant crying; that the complainant informed her that "**Uncle Philip had pricked her**" and that the complainant was in pain; that she was crying while holding her vagina and upon H examining her she saw male sperms stuck on the complainant's pants; that she took the complainant to the police patrol base and reported the incident; that the police officer arrested the appellant and H took the complainant for medical examination where she was issued with a P3 Form. It was H's evidence that the complainant informed her that the appellant defiled her in the bathroom behind the kitchen in the hotel; that the complainant informed her that the appellant was bathing when he called her; that she responded and the appellant removed her pant, forced her legs open and "pricked" her; that the complainant was born on 27th March, 2006 and H had the complainant's clinic card which proved the complainant's date of birth; and that the appellant had worked for about nine (9) months at the hotel where H worked. In cross examination, H denied owing the appellant any money or that the defilement charge against the appellant was a fabrication to prevent the appellant from demanding his salary arrears from Helen.

[5] It was the complainant's evidence that **Philip "pricked"** her in the bathroom and that he "*pricked her in the place she uses to pass urine*"; that she cried and her mother, H took her to the police post and to the hospital. The learned trial magistrate noted that the complainant pointed at the appellant (who she referred to as "Uncle Philip" or "Philip" in her testimony) as her assailant and that she avoided direct eye contact with the appellant.

[6] The complainant was examined and a P3 Form filled at the police patrol base. **Masinde** testified that he examined the complainant and estimated her age as three (3) years; that there were bruises and pus on her labia minora and that there was evidence that the complainant's vagina was damaged. Masinde signed and produced the P3 form.

[7] **PC Wario** testified that on 20th April, 2009 while at the police post, H reported that her daughter, the complainant, had been defiled by her employee, Philip Ochieng who was at the hotel where the complainant had been defiled; that together with H they proceeded to the hotel where they found the appellant leaving the bathroom and arrested him

[8] In his defence, the appellant gave an unsworn statement and did not call any witnesses. He denied the offence and stated that on 20th April, 2009 he was at his place of work until 2.00pm when he was arrested; that on 17th April, 2009 he had reported to the police that his employer (H) had not paid his dues; and that he had worked for his employer for a period of one year.

[9] In his judgment, the trial magistrate found that the evidence adduced by the prosecution was sufficient to prove that the appellant committed the offence of defilement as charged. He therefore rejected the appellant's defence, convicted him of the offence of defilement and sentenced him to life imprisonment in compliance with Section 8(2) of the Sexual Offences Act.

[10] The trial magistrate in his judgment stated as follows: -

“She (the complainant) was able to identify (sic) accused as Philip in court. I noted that the child through out her testimony avoided direct eye contact with accused. She knew accused before the incident as she used to accompany her mother to the hotel...It is clear from the foregoing that PW2 (the complainant) was defiled on the material day.”

[11] Aggrieved by that decision, the appellant filed a first appeal to the High Court and challenged the trial court's decision on the grounds that vital witnesses were not called to testify; that the prosecution did not prove its case to the required legal standard; that there was no evidence linking the appellant to the alleged offence; that there was a grudge between the appellant and the complainant's mother and that his defence was not considered.

[12] During the hearing in the High Court, the appellant was unrepresented and argued the appeal by way of written submissions. The State opposed the appeal on the grounds that under Section 124 of the Evidence Act, corroboration is not required in sexual offences; that the witnesses who testified provided sufficient evidence to sustain the conviction; that the grudge alluded to by the appellant was not relevant as there was evidence to show that the appellant was employed by the complainant's mother; that penetration was established; that the appellant was identified by the complainant who knew him before; and that the conviction was therefore sound and the sentence lawful.

[13] After reviewing the evidence on record, the learned Judge (**J. R. Karanja, J**) found that; there was clear evidence that the complainant was defiled; that the main issue for determination was whether the appellant was the person responsible for the unlawful act; that the prosecution evidence against the appellant was cogent and credible; that it proved that the appellant was the person responsible for sexually assaulting the complainant; and that the sentence of life imprisonment imposed upon the appellant was lawful.

[14] Aggrieved by that decision, the appellant filed this second appeal with a memorandum of appeal, supplementary grounds of appeal, further supplementary grounds of appeal and written submissions. The appellant's grounds of appeal can be summarized as follows: -

“a) That Voire dire examination was not conducted on the child victim, aged 3 years.

b) The appellant's defence was not considered.”

Submissions

[15] During the hearing of the appeal, the appellant who was unrepresented relied on his written submissions and urged the court to allow his appeal against conviction and sentence. The appellant submitted that the trial court failed to conduct a *voire dire* examination before admitting the evidence of the child. He argued that in law before a court receives the evidence of a child of tender years, the court must conduct *voire dire* examination of the child. The appellant contended that the two lower courts failed to observe or appreciate the requirement of **Section 19(1)** of the **Oaths and Statutory Declarations Act**. Relying on the case of **Joseph Opondo v Republic Criminal Appeal No. 91 of 1999 (unreported)**, laid down the procedure to be followed before a court receives the evidence of a child, the appellant argued that the failure to conduct *voire dire* examination by the trial court resulted in evidence that could not form the basis of his conviction.

[16] It was the appellant's further submission that in cases of assault, proof can only be obtained from a P3 form duly completed and filled by a competent medical practitioner; that the P3 form alone cannot be conclusive proof of sexual assault unless it is supported by medical treatment chits, lab request and results forms; that in the instant case medical treatment chits, lab request and results forms were not produced.

[17] The appellant also raised issue with the complainant's clothes which were produced as evidence. The appellant argued, in that regard, that the clothes had no blood stains despite the victim's hymen being broken; that the clothes had no traces of spermatozoa and further that the medical officer did not make any reference to the clothes; nor did the clothes feature in the list of exhibits; that the clothes had no probative value; and that his defence was not given proper consideration and evaluation by the trial court.

[18] **Ms. Brenda Oduor**, a Senior Prosecuting Counsel (**SPC**) appeared for the State and made oral submissions opposing the appeal. Counsel submitted that the prosecution called four (4) witnesses who proved beyond all reasonable doubt that the appellant committed the offence as charged; that the ingredients of the offence of defilement were proved; that penetration was proved by **Masinde** who produced the

P3 form and who testified that the complainant's hymen was broken and her genitalia had specific injuries; that identification of the appellant was by recognition as the appellant was known to the complainant and her mother, H and that the offence took place in broad daylight. Counsel submitted that the age of the complainant was also proved to be three (3) years at the time she was defiled.

[19] On the issue of *voire dire* examination, learned counsel while conceding that the same was not conducted relied on the case of *Kivevelo Mboloi V Republic* [2013] eKLR, and argued that in instances where *voire dire* examination is not conducted and there is independent evidence to support the charge, the court is entitled to uphold conviction and sentence.

[20] On the appellant's defence that the complainant's mother fabricated the case against him as he was demanding for his salary, counsel submitted that the first appellate court observed that this was an afterthought; and that whereas the appellant was arrested a few minutes after the incident, he did not raise the issue of a quarrel with the complainant's mother regarding salary arrears at that stage.

Determination

[21] We have considered the appeal, the contending submissions, the authorities cited and the law. This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only. We reiterate what this Court stated in *Dzombo Mataza vs R*, [2014] eKLR:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see *Okeno v Republic* (1972) E.A. 32.

By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”

[22] The appellant was charged with defilement contrary to **section 8(1)** as read with **section 8(2)** of the Sexual Offences Act. The onus was on the prosecution to prove the particulars of the charge.

Sections 8(1) and 8(2) of the Sexual Offences Act provide as follows: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2). A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

[23] In order to prove the charge prosecution had to establish that there was penetration of the genital organs of the complainant, that the complainant was under the age of 11 years and that the appellant was the perpetrator of the act causing penetration. In the instant appeal there was sufficient evidence adduced by the complainant, her mother and Masinde which indicated that the complainant was defiled and that she suffered injuries on her private parts which confirmed that there was penetration.

[24] Regarding the age of the complainant, the clinical officer, Masinde who filled the P3 form estimated the complainant's age as 3 years. H, produced the complainant's clinic card confirming that the complainant was born on 27th March, 2006 and was aged about 3 years at the time she was defiled. There was therefore sufficient evidence to prove that the complainant was about 3 years old. It was therefore clear that the complainant was under 11 years of age.

[25] Regarding the identity of the person who defiled the complainant, it was the complainant's testimony that the appellant defiled her, that she knew the appellant and gave his name to her mother. It was H's testimony that the complainant informed her that the appellant had defiled her; that the appellant worked for her at [Particulars Withheld] Hotel and was therefore well known to her; and that the appellant was seen by H and PC Wario leaving the bathroom at H's hotel where the appellant worked and where the complainant testified that she was defiled. The evidence of the complainant regarding the identity of the person who defiled her was corroborated by that of H, and was consistent with the evidence of Masinde and PC Wario. The identity of the defiler was therefore clearly established. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence.

[26] The appellant raised the ground that the evidence of the complainant was improperly admitted as the trial court failed to conduct *voire dire* examination on the complainant. The record confirms that in fact no *voire dire* examination was conducted by the trial court.

[27] The basis of subjecting a child of tender age to *voire dire* examination can be found under **Section 125 (1)** of the **Evidence Act**, which states 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.”

Section 19 (1) of the **Oaths and Statutory Declarations Act** forms the basis of receiving the evidence of a child of tender years and states 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 is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.

[28] In Johnson Muiruri V. Republic [1983] KLR 447, this court gave guidance on how to conduct a *voire dire* examination as follows: -

“We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported) we 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”.

[29] The respondent conceded that *voire dire* examination on the complainant was not conducted. What therefore is the effect of the failure by the trial court to conduct a *voire dire* examination on the complainant? In the case of Maripett Loonkomok v Republic [2016] eKLR, this Court stated as follows: -

“It is firmly settled that not in all cases that voire 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”.

The court went on to state as follows: -

“It follows from a long line of decisions that voire 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 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 Mwinyi v R Cr. 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”. (Emphasis added)

[30]The evidence of H, who was the complainant’s mother supported the charge. H testified as follows: -

“Shortly thereafter I saw F coming crying. She told me Uncle Phillip had pricked her and she was in pain. She was crying while holding her vagina. D told me to check the accused’s private part. I removed the child’s clothes halfway and I saw male semen stuck to the child’s pant”.

From the evidence of H, Masinde, Chrisantus and the Investigating Officer, Police Constable Jillo, there was therefore ample and sufficient independent evidence to support the charge. Accordingly, 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, this did not vitiate the entire trial as there was sufficient independent evidence to support the charge.

[31] The appellant also raised the ground that his defence was not considered. It was the appellant’s claim that his defence statements were not listed as exhibits; that his defence that he was implicated due to H’s indebtedness to him in salary arrears; that on 17th April, 2009 he reported to the police the issue of the salary arrears owed to him by H; that he was arrested barely two (2) days later; that his defence was plausible and was not adequately considered nor evaluated. However, PC Wario denied that the appellant reported to him that his employer, H owed him nine (9) months’ salary. He maintained that the appellant came up with the issue of salary arrears after his arrest.

The first appellate court found as follows:

“The prosecution evidence against the appellant was cogent and credible. It proved that he was the person responsible for sexually assaulting the child victim. His defence was thus discredited and rendered an afterthought. His conviction by the learned Magistrate was sound and proper.”

[32] We take note of the Supreme Court's decision in **Francis Karioko Muruatetu & Another v Republic SC. Petition No. 15 as consolidated with Petition No. 16 of 2015** in which the Supreme Court stated that the mandatory nature of the death penalty as provided under Section 204 of the Penal Code denies the Court its legitimate jurisdiction to exercise its discretion in sentencing. This Court recently in **Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014** extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory sentences provided under the Sexual Offences Act and held that Section 8 of that Act must be interpreted in a way that does not take away the discretion of the Court in sentencing. In the appellant's case the minor complainant was established to be 3 years old. The appellant's action of sexually assaulting such an innocent child was reprehensible. He behaved like an animal and the sentence of life imprisonment would be appropriate to keep him away from society in order to protect such innocent children.

Accordingly we find the sentence of life imprisonment imposed upon him lawful and proper.

[33] The upshot of the above is that we find no merit in this appeal and do therefore dismiss it in its entirety.

[34] This judgment is delivered under Rule 32 (2) of the Court of Appeal Rules, as one judge declined to sign it.

Dated and delivered at Eldoret this 6th day of June, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.