



IN THE COURT OF APPEAL

AT MOMBASA

(MAKHANDIA, OUKO & M'INOTI, JJA)

CRIMINAL APPEAL NO. 11 OF 2015

BETWEEN

A A MAPPELLANT

AND

REPUBLICRESPONDENT

(Being appeal from the judgment of the High Court at Mombasa

(Muya, J.) dated 22nd March 2014

in

Criminal Appeal No. 422 of 2010)

JUDGMENT OF THE COURT

At some point in life, **M B** (PW2) and **AAM**, “*the appellant*” were in a “come we stay” relationship. That relationship begot them a child, “*the complainant*” who at the time of the incident leading to these proceedings occurred was aged 5 years. However they were never able to walk down the aisle in holy matrimony. Soon thereafter, matters came to an abrupt and acrimonious end when PW2 and the complainant walked out on the appellant. Later by mutual arrangement PW2 retained the physical custody of the complainant but the appellant would occasionally drop by to take a stroll with him. This is what happened on 28th July, 2009 at about 5 p.m. The appellant came by and took the complainant who had just come back from school for the usual stroll. About 2 ½ hours later the complainant came back to his mother’s house unaccompanied by the appellant. Apparently the appellant had left him at a nearby mango tree to walk home. PW2 did not notice anything untoward with the complainant. However, later the complainant felt pain and could not sit down to eat. It is then that PW2 examined his anal area and noted some cuts. She immediately took the complainant to Tiwi hospital where he was examined by **Sarah Koech**, a clinical officer. Her examination revealed bruises on the anal area that was tender on touch. The clinical officer then filled the P3 form that was tendered in evidence on her behalf by her colleague, **Grace Njuguna** (PW4).

In the meantime the grandfather to the complainant **JK** (PW3) and the father to PW2 had on the material day seen the appellant and the complainant at the appellant’s barber shop. This was about 6.45 p.m. The

appellant bought the complainant chips and later escorted him back home. An hour or so, PW3's other daughter reported to her mother that the complainant had come home alone and that it was suspected that he had been sodomized by the appellant. On the basis of this information PW3 caused the arrest of the appellant the following morning and escorted him to Diani Police station where he was received by **P.C. John Limo** (PW5). After taking down the complaint, PW5 re-arrested the appellant and commenced investigations. Done with investigations, PW5 preferred against the appellant a single charge of unnatural offence contrary to **Section 162(a)** of the Penal Code. The particulars given were that on the 28th July 2009 in Msambweni District within Coast Province, the appellant had carnal knowledge of the complainant against the order of nature.

On 4th September 2009, the appellant took the plea on the charge before the Principal Magistrate's court at Kwale and pleaded not guilty. In his sworn statement of defence, the appellant claimed that until about 26th July 2009 they had been cohabiting with PW2 as man and wife. As a result of the cohabitation they were blessed with the complainant. They later disagreed and parted ways. PW2 moved out with the complainant but the appellant maintained visitation rights every weekend when he could take the complainant out and also paid his school fees. Things however, came to a head when he received information that PW2 was having sexual liaisons with other men and one of them was in fact staying in the same house with the complainant and PW2. It was then that he decided not to pay school fees resulting in the complainant being chased from school. Later PW2 confronted him over the issue and threatened to teach him a lesson that he will never forget. On 16th June 2009 he was arrested and locked up at Diani police station on a complaint of defilement lodged by PW2. The appellant was however, subsequently released on police bond. PW2 was not amused with the turn of events and warned the appellant once more that what he had tasted at the police station was just the beginning of his tribulations. On 25th July 2009 the appellant went to see the complainant and took him out for a walk as usual. Later that evening, he returned the complainant and handed him over to his grandmother. He was therefore surprised when PW3 came the following day and demanded that he accompanies him to the office of the chief. From the chief's office he was taken to Diani Police Station and charged with an offence he knew nothing about. As far as he was concerned, the case was a frame up.

Hon. Ogembo D. O., Principal Magistrate, having considered the evidence on record by both the prosecution and defence, was persuaded that the prosecution had discharged its burden of proof as required by law. Accordingly, he convicted the appellant and sentenced him to 15 years imprisonment after having heard the appellant's plea in mitigation.

Being aggrieved by the judgment of the trial court, the appellant lodged an appeal in the High Court at Mombasa contending that his constitutional rights were infringed following long incarceration in the police station before he was arraigned in court; that the trial court did not consider that the case had been fabricated against him; that there was no nexus between him and the sodomy complained of, that the case was poorly investigated; and lastly no *voire dire* examination of the complainant was conducted before his testimony was received in evidence.

On 21st March 2014 the High Court (**Muya, J.**) dismissed the appeal, sustained the conviction of the appellant and upheld the sentence, thereby precipitating his 2nd and perhaps last appeal. The appellant has advanced an aggregate of four grounds of appeal:-

- That there was a violation of Section 214 of the Criminal Procedure code.
- That the age of the complainant was not established by credible evidence.
- No *voire dire* examination of the complainant was conducted before his evidence was received.
- His defence which was reasonable and capable of displacing the prosecution case was not given due consideration.

The appellant requested and was allowed to canvass the appeal by way of written submissions which we have carefully read and considered alongside cited authorities.

Mr. Peter Kiprop, learned Principal Prosecution counsel in opposing the appeal, submitted that

amendment of the charge sheet is a preserve of the prosecution and the court and that there were no defects in the charge sheet as drawn. On the question of age of the complainant counsel submitted that such proof is not required since the appellant was charged under the Penal Code as opposed to the Sexual Offences Act. That **Section 11** of the Criminal Procedure Code requires that evidence be taken on oath. This was done and any complaint to the contrary is unmerited. On **Section 36** of the Sexual Offences Act, which deals with the evidence of medical or forensic nature and in particular, the need for DNA testing, counsel submitted that it was an administrative action of the court and was discretionary and not mandatory in nature. On *voire dire* examination of the complainant, counsel maintained that it was not a mandatory requirement. For this proposition, counsel relied on this Court's decision in the case of **Dennis Osoro Obiri v Republic [2014]** eKLR. Concluding his submissions, counsel maintained that with regard to the language of the proceedings in the trial court, the record spoke for itself. The language of the court and that which the appellant elected to have the proceedings conducted was indicated.

We have duly perused and considered the records of the two courts below as well as the respective written and oral submissions and the authorities cited.

Section 361 of the Criminal Procedure Code demands of this court that it considers matters of law only when hearing and determining a second appeal. This Court too in a string of decisions has stated that it will pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the evidence, no reasonable tribunal properly directing itself would arrive at such findings. See **Karinga v Republic [1982] KLR 219**.

We consider all the issues raised by the appellant as matters of law. We shall therefore consider them in the order in which they were presented to us.

The first issue is the alleged violation of **Section 214** of the Criminal Procedure Code. This section generally deals with variance between the charge and evidence and also amendment or substitution of a charge. In his written submissions the appellant has not pointed out why and how this section was violated. For instance he does not state that the evidence tendered by the prosecution was at variance with the charge or that the charge was defective either in substance or in form so as to invite the trial court, at any stage of the trial before the close of the case for the prosecution, to order either for the amendment, substitution or addition of a new charge. His submissions are silent on this aspect. In the premises we agree with Mr. Kiprop that that complaint has no merit at all which we accordingly dismiss.

In his second ground of appeal, the appellant complains about lack of proof of age of the complainant. We do not think that this is a valid complaint. The particulars of the charge sheet were specific. That the appellant had carnal knowledge of the complainant against the order of nature. Age was not part of the particulars to be proved. We suspect that the appellant is confusing this offence with those preferred under the Sexual Offences Act such as defilement where proof of age is a necessary prerequisite. Our suspicion is bolstered by the fact of the appellant's reliance on this Court's decision in **Kaingu Elias Kasomo v Republic, Criminal Appeal Number 504 of 2010**. In that case, this Court was addressing the strict requirement of proving the age of the victim of defilement or rape under the Sexual Offences Act. The authority is therefore irrelevant in the circumstances of this case. For in the instant case, the appellant was not charged under the Sexual Offences Act. Rather he was charged under the Penal Code. We would in the circumstances once again agree with Mr. Kiprop's submission that the complaint has no merit.

Next was failure by the trial court to conduct *voire dire* examination before receiving the evidence of the complainant. No doubt this complaint is valid. It is trite law that under **Section 19** of the Oaths and Statutory Declarations Act that before the evidence of a child of tender years is received in court, a *voire dire* examination should be conducted in order to gauge or determine whether he knows the meaning of an oath and the importance of telling the truth. In the words, the true purpose of a *voire dire* examination is to establish whether a child of tender years understands two things; the nature of the oath and the need to tell the truth. In sum the court would be trying to establish whether the child of tender years possesses sufficient intelligence to understand the duty of speaking truthfully. If the court proceeds to rule that he

gives unsworn evidence, the accused should not be convicted in the absence of other corroborating evidence. There is however an exception to this general requirement as regards sexual offences. The proviso to **Section 124** of the Evidence Act allows for a conviction to be entered in a criminal case involving a sexual offence even if the only evidence is that of the alleged victim of the offence, if for reasons to be recorded, the court is satisfied that the alleged victim is telling the truth. The case of **Dennis Osoro Obiri** (supra) relied on by the State merely emphasized this fact. It did not say that the need for *voire dire* examination before accepting or admitting on record evidence of a child of tender years was no longer a legal requirement. In our view the submission by Mr. Kiprop on this score was erroneous and misleading. To that extent the authority aforesaid is of no assistance to the State's submission on that question. It is actually not relevant.

The law and procedure relating to reception of evidence of children of tender years was re-stated in **John Muiruri v R (1983) KLR 445** and **Yusuf Sabwani Opicho v Republic [2009] eKLR**. In the latter case, this Court stated:- **"...The procedure for investigations or preliminary examination of a witness otherwise referred to in old French and Anglo-Norman as the "voire dire" or "voir dire" is taken in two step as summarized in Kinyua v Republic [2002] 1KLR 256;**

"(a) The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. The investigation need not be a long one but it has to be done and it has to be directed to the particular question whether the child understands the nature of an oath. If upon investigation it appears that the child understands the nature of the oath, then the court proceeds to swear or affirm the child and to take his or her evidence.

(b) If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence. The court may still receive the evidence if it is satisfied upon investigation that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth. This investigation must be done and when done, it must appear on record. Where the court is so satisfied the court will proceed to record unsworn evidence from child witness."

Further in **Johnson Muiruri** (supra) this Court re-emphasized, inter alia that:

"2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of the 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...

6. The Judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of oath. The failure to do so is fatal to the conviction.....

9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth." (Emphasis provided)

So there it is. *Voire dire* examination of a child of tender years is a mandatory requirement before his or her evidence is received. The record of proceedings must show how the exercise was conducted and should preferably be in the format of a question and answer. Failure to comply with these legal requirements is fatal to the resultant conviction if at all.

So what transpired in the case before us? According to the trial court when the complainant appeared in court on 25th March 2010 to testify the court observed;

"...I have seen the intended witness. He is a young child of about 3-5 years. Obviously he

does not understand the nature of oath. I find that he may give unsworn evidence.”

The complainant then proceeded to testify. Can this pass for *voire dire* examination? Not at all. There is nothing in the record to show the manner in which the child was examined or the questions asked of the child and his response thereto as to form the basis upon which the trial magistrate reached his conclusion. There is no doubt at all that the approach adopted by the trial court was casual and in flagrant disregard of **Section 19** of the Oaths and Statutory Declarations Act and the elaborate procedure laid above.

We note that the issue was raised in the High court on appeal but it was given short shrift with **Muya, J.** only observing;

“On that issue there is nothing to show that the trial magistrate did rely on the evidence of the complainant....”

The issue here is not whether the trial magistrate relied on that evidence. The issue is whether the procedure of accepting the evidence of a child of tender years was followed. In whatever manner the trial court chose to treat the evidence as relevant. The court having failed to comply with the legal requirements of *voire dire* examination before receiving the evidence of the complainant, the appellant’s conviction cannot stand, more so when there was no other independent evidence. In an appropriate case where *voire dire* is not conducted, but there is sufficient independent evidence to support the charge (inquiring the evidence of the child), the court may still be able to uphold the conviction.

What is the way forward? As stated in **Yusufu Sabwani Opicho** (supra) “...*The child was a vital witness in the trial and the failure by the court to comply with the procedure in the reception of his evidence vitiates that evidence....* The same situation obtains here. The complainant was a vital witness in this case for he and he only knew what went on between himself and the appellant if at all, on the material evening. The court in Opicho then proceeded to order for a retrial. It is trite that when there is a mistrial an appellate court may order a retrial or set an appellant free depending on the circumstances of each case.

However we are reluctant to go the route of a re-trial as we shall shortly demonstrate. There is evidence on record that all was not well between PW2, PW3 and the appellant. The appellant in his defence suggested that PW2 had earlier on framed him with a case of defilement. When he was subsequently given police bond, PW2, was not happy and threatened him with further retribution. In no time he was again arrested and subsequently charged with the instant offence. Further the appellant testified that after walking the complainant he surrendered him to the mother of the PW2 in other words the maternal grandmother. This evidence was given on oath. Surprisingly the prosecution never cross examined him on any of these aspects of the case. Nor did the prosecution attempt to contest or challenge the appellant’s assertion that the case was a frame up.

It is also surprising that it was PW3 who went for the arrest of the appellant long before the results of the examination of the complainant were known to him. Further from the evidence of the complainant, PW2, and PW4 nowhere is it suggested that it is the appellant who sodomized the complainant if at all. In fact the complainant merely testified;

“...I cannot remember the date of the incident. Nobody did anything to me....”

As for PW2 she stated;

“.....I went back home at 7.30 p.m. and found the child. He then told that me the accused had brought him up to the mango and left him to reach home. He also told me he was hungry. I prepared food. Then the child told me he was feeling pain (sic) and could not sit down to eat. The complainant grew (sic) and he could (sic) not eat. He then showed me his canal region as painful and he cried. I told my aunty (sic) who told me to take him to hospital. I first examined him. His anus was had cuts and had blood stains....”

This is all she says regarding her encounter with the complainant. Nowhere in her entire testimony does she allude to the appellant having done anything untoward to him. Nowhere does the complainant tell her that he was sodomized and if so by the appellant. As for PW4, the clinical officer, her evidence was inconclusive as to whether the complainant was actually sodomized. She merely testified that “.....*There was evidence of soft tissue injury on anal region...*” However she does not attribute this solely to sodomy. In fact the p3 form tendered in evidence with respect to the complainant is silent as to whether or not the complainant was sodomized.

Given all the foregoing, we are satisfied that the criminal proceedings instituted against the appellant were designed to achieve ulterior motives by PW2 and 3. They were invoked to settle scores after the relationship between the appellant, PW2 and her relatives turned sour following the fall out and the complainant was unfortunately used as pawn. This indeed is despicable.

The appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty unless otherwise lawfully held.

Dated and delivered at Mombasa this 26th day of February, 2016.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR