



**IN THE COURT OF APPEAL**

**AT NYERI**

**CORAM: WAKI, NAMBUYE & KIAGE, JJA)**

**CRIMINAL APPEAL NO. 12 OF 2014**

**BETWEEN**

**D W M..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

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

*Keroguya (B.Olao, J.) dated 26<sup>th</sup> November, 2013).*

*in*

**(H. C. Cr. A. No.185 of 2012)**

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**JUDGMENT OF THE COURT**

1. The appellant **D W Mo** was arraigned before the Senior Resident Magistrate's Court at Baricho for the main offence of defilement contrary to Section 8(1) (2) of the **Sexual Offences Act No. 3 of 2006**, in that on the 24<sup>th</sup> September, 2010 in Kirinyaga South District he penetrated the vagina of H.W, a girl aged 5 years, with his penis. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Act, in that on the same day and place he committed an act of indecency with H.W by rubbing his penis against her buttocks. The appellant denied both counts prompting the trial in which the prosecution called a total of five (5) witnesses while the appellant was the sole witness for the defence.
2. The brief facts are that **H.W.** who testified as PW1 is the biological daughter of **R** and the appellant. **R** left home on 22<sup>nd</sup> September, 2010 to attend a funeral of her brother-in-law leaving behind **H.W** under the care, control and custody of the appellant. She returned on 24<sup>th</sup> and upon arrival in the home **H.W.** was not there. She traced her at a neighbour's place. She noticed **H.W.** looked disturbed and afraid. **R** inquired from her what the problem was and that is when **H.W** told **R** that she had been defiled by the father. **R** examined her private parts and observed that **HW's** vagina was wide open and red. She then took **H.W** to **Jane** (PW5) a neighbour on 26<sup>th</sup> September, 2010 to whom **H.W** narrated her ordeal. Jane also examined **H.W.'s** private parts and noted that her vagina was swollen and had tears. **R** then reported the incident to the area in-charge (title-assistant chief? Village elder? Headman?) **Baba Karis** who referred them to police. The police

- upon booking the report referred them to hospital where a P3 was filled by a clinical officer and later produced by **Nancy (PW4)** as an exhibit. The findings in the P3 were that the **H.W's** hymen was broken and her vagina was inflamed. The clinical officer concluded that H.W had been defiled. The appellant denied the offence alleging a frame up because of differences between him and his wife **R**.
3. The learned trial magistrate upon assessing and analyzing the evidence tendered before him found the appellant guilty of the offence in the main count, convicted him and sentenced him to life imprisonment. The appellant was aggrieved by that conviction and sentence and he appealed to the High Court. The learned first appellate **Judge (B. N. Olao, J)** after re-assessing, re-evaluating and re-analyzing the record before him, found no error in the trial court's findings on the appellant's culpability; for the main offence, save that, in view of the relationship between the appellant and **H.W**, the offence committed was incest which he substituted and sentenced the appellant to serve twenty (20) years imprisonment for the reasons given. He set aside the conviction and sentence for defilement.
  4. The appellant is now before us on a second appeal raising four (4) grounds of appeal which, in summary, are that the learned first appellate court judge fell into an error when he affirmed the appellant's conviction and sentence notwithstanding, that the same was founded on inconsistent, contradictory and incredible evidence.
  5. The appellant appeared before us in person and handed in written submissions in support of his grounds of appeal. He relied on the case of **Abel Monari Nyamunga versus Republic Criminal Appeal No. 86 of 1994** to demonstrate that the evidence of **H.W** needed corroboration and could not therefore, be used to add credence to the testimonies of PW2 and PW5. He cited the case of **Michael Mugo Musyoka? versus Republic Criminal Appeal Nyeri No.89 of 2013** to support his argument that had the 1<sup>st</sup> appellate Judge reconciled the material contradictions and inconsistencies in the evidence of PW1, 2 and 5, he would have found it doubtful and incapable of supporting the appellant's conviction. He also argued that the 1<sup>st</sup> appellate judge failed to note that vital evidence had not been adduced, that is from the village elder to whom PW2 made the first report of the alleged defilement. Furthermore, the bed sheets from the bed where H.W. was allegedly defiled had not been produced in evidence. There was also an unreconciled discrepancy as to the exact date when the alleged offence took place i.e 23<sup>rd</sup>, 24<sup>th</sup> or 26<sup>th</sup> September, 2010. On his defence of *alibi* he relied on the case of **Wangombe versus Republic [1980] KLR 149** to support his argument that he was not under any obligation in law to prove or disprove his *alibi*. Finally, he argued, his defence was not given due consideration by the two courts below.
  6. In response to the appellant's submissions, **Mr. J. Kaigai** the learned ADPP urged us to dismiss the appeal on the grounds that the prosecution's evidence against him was overwhelming, clear and consistent; it is on record that PW1 promptly informed **R** about the incident as soon as **R** arrived back in the home and later repeated the story to **Jane** (PW5) when **R** took her to PW5; both **R** and **Jane** physically examined **H.W** and confirmed that **H.W** had been defiled, a fact later confirmed by medical evidence through **Nancy**, (PW4). The appellant's defence was considered by the two courts below and found displaced.
  7. In reply to the respondent's submissions the appellant argued that **R's** failure to report to the police immediately and instead seeking support from both PW5 and **Baba Karis** was simply to create an avenue for them to fabricate the case against him.
  8. This is a second appeal. This Court is restricted to addressing itself to matters of law only. It will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See the case of **Kaingo versus Republic [1982] KLR 213** at page 219 wherein this Court stated thus:-

***“A second appeal must be confirmed 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 rest to be applied on second appeal is whether there was any evidence on which the trial court find as it did (Reuben Karoti S/O Karanja versus Republic [1956 17EACA 146].”***

9. We have revisited the record on our own and considered it in the light of the rival arguments set

out above. In our opinion, two issues arise for our consideration:

- i. Whether voir dire was properly administered before the testimony of H.W. was received as evidence; and*
- ii. Whether the learned first appellate Judge discharged his mandate properly.*

10. With regard to the administration of the *voir dire*, when **H.W.** took the witness stand at the commencement of the trial before **J.N. Mwaniki SRM** on 26<sup>th</sup> October, 2010, the sequence of the conversation between **H.W.** and the trial magistrate reads as follows:

*“PW1 a girl aged 5 years in probing questions then states I am H.W a resident at [particulars withheld]. I am aged 5 years. I am a student at [particulars withheld] Primary School in nursery. I do go to church at [particulars withheld]. I do not know the meaning of a oath (sic). I will answer all questions put to me correctly.*

*Court: The juvenile to give unsworn statement. PW1 in unsworn statement states.....”*

It is evident from the above that the learned trial magistrate did not reflect in the record the questions put to H.W. during the *voir dire* administration but reflected her responses to those questions.

11. The need for the administration of *voir dire* on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in **Section 19 of the Oaths and Statutory Declarations Act Cap 15** Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In *Sula versus Uganda [2001] 2EA 556* the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter.

12. In *Patrick Kathurima versus Republic Nyeri CRA 137 of 2014* this Court after reviewing case law on the subject observed thus:-

*“It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Compell (Times) December 20, 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.”*

13. On account of the above observation this court in the **Kathurima case** vitiated the prosecution case totally on account of it having been anchored on the minor’s contradictory evidence and on that account allowed the appeal in its entirety.

14. There was however no hard and fast rule laid down by this Court in the **Kathurima case** (supra) that in all cases where *voir dire* procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-

*“It is best though not mandatory in our context that the question put and the answers given by the child during the voir dire examination be recorded...”*

*The trial magistrates’ failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions’ case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable*

*doubt.* (Emphasis added)

15. The failure to give sworn evidence notwithstanding, **H.W.** was subjected to cross-examination by the appellant. In ***Sula versus Uganda (supra)*** the supreme court of Uganda ruled that:

***“A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.”***

16. In ***Nicholas Mutula Wambua & another versus Republic Mombasa Criminal Appeal No. 373 of 2006 (UR)*** this Court when confronted with a similar issue construed **Sections 208 and 302** of the Criminal Procedure Code governing trials in the subordinate court and the High Court respectively and arrived at the conclusion that cross-examination of a witness who had given evidence not on oath is permitted by law. The Court approved the view taken by the Supreme Court of Uganda in the ***Sula case (supra)*** that cross-examination of a child who gives evidence not on oath is meant to test the veracity of such child's evidence. In the ***Nicholas Mutula case (supra)*** the Court went over the responses given by the child witness both during the *voir dire* examination and in cross-examination of his/her unsworn testimony and then observed thus:-

***“But in our evaluation, the answers the child gave during the voir dire were intelligent. He understood that it was wrong to lie. His evidence was coherent;”*** and on that account allowed the child's testimony to stand.

17. In this appeal, in response to a questions put to **H.W.** during the *voir dire* examination, she responded that she would answer all questions put to her correctly. She was five (5) years old. Her testimony was coherent. When the appellant stood to cross-examine her she at first broke down. She was stood down for a while. After she composed herself and then took the witness stand again, she was cross-examined at length by the appellant but never faltered in her responses to questions put to her by the appellant. She was coherent. All the answers she gave were sensible. This is a clear indication that **H.W** was intelligent, she had a good grasp of the events that occurred during the defilement and was obviously truthful in what she was telling the court.

18. Both courts below believed **H.W.** was truthful. We find no justification to interfere with that finding. The appellant's trial was therefore not vitiated by the learned trial magistrate's failure to conduct the *voir dire* examination of **H.W** in a particular manner, as asserted by the appellant.

19. Turning to the 1<sup>st</sup> appellate court's mandate, we have on our own considered its judgment. The learned judge took note of the grounds of appeal the appellant had put forth in his challenge to the trial court's findings. He then reminded himself of his mandate thus:-

***“ This being a first appeal, I must consider and re-evaluate the evidence a fresh and be satisfied that it was proper to support a conviction on the charge facing the appellant. In doing so, howsoever(sic?) I must remember that unlike the trial court I have not had the advantage of seeing the witnesses..”***

20. After re-assessing, re-evaluating and re-analyzing the evidence before him, he proceeded to make findings on the appellant's grievances. With regard to discrepancies in the date of the commission of the offence the learned Judge observed that the charge sheet gave the date of 24<sup>th</sup> September, 2010 as the date of the offence which was the same date given by the complainant while the clinical officer gave the date of 23<sup>rd</sup> September in the P3. The judge noted that the mother left home on the 22<sup>nd</sup> September, and came back on the 24<sup>th</sup> which would only mean that the offence must have taken place on the 23<sup>rd</sup> September, 2010. The appellant had also stated in his defence that the incident started on 23<sup>rd</sup>. These discrepancies were reconciled and found curable. We have no quarrel with that finding.

21. With regard to appellant's conviction on uncorroborated evidence, the learned Judge took note of the proviso to **Section 124** of the Evidence Act Cap 80 Laws of Kenya which allows a court to convict on the basis of the uncorroborated evidence of a single witness if it is satisfied that;

***“the victim is telling the truth.”***

The learned judge then made observation that the trial magistrate was alive to the need to administer the *voir dire* procedure on the child witness, before reception of her testimony and that he had formed an opinion with regard to the minor’s intelligence and ability to speak the truth thus:-

***“She gave unsworn evidence. She remained candid even on cross-examination by the accused person. She never gave the court any reason to doubt her recollection of the events of the material night”.***

On that account, the Judge made a finding that the learned trial magistrate was satisfied that the complainant, though aged five (5) years and the only eye witnesses to the event, was speaking the truth. The judge found no reason to fault the learned trial magistrate on that observation as the magistrate had seen and heard the complainant and other witnesses and found them truthful. There was no reason for the learned Judge to depart from that finding. He then observed thus:-

***“ The proceedings indicate that the appellant put questions to the complainant which she answered. Therefore the trial magistrate having believed that the complainant was speaking the truth, he was entitled to base his conviction on her evidence notwithstanding, lack of corroboration.***

22. With regard to proof of defilement, the learned Judge concurred with the findings of the learned trial magistrate that the medical evidence tendered through the P3 indicated clearly that the complainant had been defiled. In addition to the medical evidence, the trial magistrate also accepted the evidence of **Rebecca** who had examined the complainant and found her vagina **“wide open and very red”**, and that of PW5 who also examined her and found her vagina swollen with a tear. On that basis, the learned judge affirmed the trial magistrate’s finding that the complainant was defiled.

23. With regard to the identification of the perpetrator the learned Judge had this to say:-

***“There was no evidence to suggest that there was any other male person in the house at the time of the incident other than the appellant in this case. Indeed he confirmed in his defence that his wife had left him at home with the complainant. The appellant therefore had the opportunity to commit the offence during the absence of his wife and although mere opportunity to commit an offence does not in itself amount to corroboration, the opportunity may be of such a character that taken together with other circumstances may in themselves amount to corroboration”***

Consistent with ***Malonza? versus Republic [1986] KLR 426***, the judge made findings that the appellant’s admission in his defence that he was the only male person in that house and therefore the only person who had an opportunity to commit the offence, coupled with the fact that the complainant was found defiled the next morning after she had been left under the care of the appellant; offered sufficient corroborative evidence to that of **H.W**. The appellant was thus placed at the scene of the offence and his allegation that he had been convicted on uncorroborated evidence stood displaced.

24. On the mode of production of medical evidence, the learned Judge agreed with the appellant’s contention that the record was clear that the clinical officer who had examined the complainant and filled the P3 was not availed in court to tender that evidence. The P3 was however tendered in evidence by **Nancy Kuria** (PW4) a colleague who was familiar with her handwriting. The judge found, as did the learned trial magistrate, that this mode of production of the P3 was within the limits permitted in **Section 77** of the **Evidence Act** (supra) was properly received by the court as evidence. The explanation given that the maker was away on study leave was to the learned judge plausible. Nothing therefore turned on the appellant’s complaint in this regard considering that he had not insisted at the trial that the maker of the document be called, neither was any complaint made by the appellant at the trial that the witness was unable to respond to his questions on the P3.

25. The learned Judge concurred with the learned trial magistrate’s rejection of the appellant’s

assertions on fabrication of charges because there was no suggestion in his cross-examination of his wife that the two had any prior differences. In his defence, the appellant only mentioned that he quarreled with his wife on 23<sup>rd</sup> September, 2010 when she left but there was nothing to suggest that **R s'** evidence was motivated by malice as **R** only repeated in her testimony what the complainant had narrated to her. On that account the learned judge affirmed the trial magistrate's finding that there was nothing on the record that would suggest that the complainant and her mother **R** acted in concert to make up a case against the appellant.

26. Taking all the totality of the above into account, we find that the first appellate judge was very thorough in his re-analyzing of the record before him. He considered in great detail each and every complaint raised by the appellant on appeal before him. He backed each with supportive evidence and all along gave sound reasoning as to why he either upheld or discounted any issue raised by the appellant. The reasoning was well balanced, fortified by principles of law as and when there was need to cite these, and we find no fault in the approach taken by the 1<sup>st</sup> appellate court. We are in agreement that both courts below arrived at the correct conclusion as to the culpability of the appellant.

27. As for the sentence the 1<sup>st</sup> appellate court properly addressed its mind to the operative words in **Section 20(1)** of the Sexual Offences Act that the offender "**Shall be liable to imprisonment for life**" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion.

28. The upshot of the above is that there is no merit in the appeal. It is dismissed in its entirety.

*Dated and delivered at Nyeri this 3<sup>rd</sup> day of February, 2016.*

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**