IN THE COURT OF APPEAL

AT NYERI

(CORAM : WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 33 OF 2011

BETWEEN

JULIUS CHERUIYOT …..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kericho (G.B.M. Kariuki, J.) dated 1st February, 2011

in

H.C.Cr. A. No. 40 of 2009)

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JUDGMENT OF THE COURT

The appellant **JULIUS CHERUIYOT** was charged in the Senior Resident Magistrate's court at Bomet in Criminal Case No. **1053 of 2007** with the offence of defilement of a girl of seven (7) years contrary to section 8(2) of the Sexual **Offences Act No. 3 of 2006**.

The particulars of the offence were that on the 17th day of September 2007 at [Particulars withheld] area in Bomet District of the Rift Valley he province had an unlawful and intentional carnal knowledge of M.C a girl aged seven (7) years. The appellant denied the charge prompting a trial in which the prosecution called five (5) witnesses, while the appellant was the sole witness for his defence.

The brief facts are that on the material date of 17th September 2007 five (5) minors namely; F, M.C., D, R and R.K.K. were on their way from school headed to their respective homes. On nearing Kibiribiriti river they met the appellant whom R.K.K PW3 claimed to have known before as a worker in their home. He was washing his hands in the river. He inquired from them if any of them wanted a rabbit. They all replied in the affirmative. On hearing that, the appellant picked on M.C and D to accompany him into the bush to get the rabbit. The rest were left waiting for their rabbits by the river side. On reaching the bush the appellant allegedly told MC and D to wait for him at a certain spot as he left for the bush to get the rabbits. He shortly thereafter came back empty handed and on reaching where he had left the two, he commanded M.C to remove her clothes and lie down facing up, which she did. The appellant then removed his trousers, lay on her and defiled her in the presence of D. He then released the two to go their

way. M.C. and D went back empty handed without rabbits, with M.C in tears. When asked by R.K.K. as to what was the matter she did not disclose to the other three what had happened to her in the bush. They all left for their respective homes and reported the matter to their parents.

M.C was thereafter taken to Bomet District hospital where she was examined by **Cycliffe Rutto, (**P.W. 4) who noticed fresh blood stains on her genitals and a torn hymen. No lab tests were carried out as PW 4 alleged it was not possible to do so but did not elaborate. He however concluded that the minor had been defiled based on the history given by the victim and her mother, and the physical examination he carried out. He filled and signed the P3 form which he tendered in evidence.

The appellant was thereafter arrested and charged with the offence. Neither the investigating officer nor the arresting officer attended court to give evidence. **PC Elias Wambugu** (PW5) indicated clearly that his role was limited to being handed the investigation file by a police officer who had gone on transfer (presumably the investigating officer) and the bonding of the reminding of witnesses.

The appellant made an unsworn statement in his defence that he was accosted by a group of persons who demanded he buys them beer. When he declined they roughed him up. He decided to report the incident to police. They left for the police station with the said persons where the people talked to the police in English which he did not understand. He was surprised when he was locked up and charged with an offence he did not commit.

At the close of the trial, the learned trial magistrate **T.O. OKELLO** was satisfied that the prosecution's case was proved beyond reasonable doubt. He found the appellant guilty as charged, convicted him and sentenced him to life imprisonment.

The appellant was aggrieved and appealed to the High Court Criminal at Kericho. The learned Judge **G.B.M. Kariuki, J** SC, (as he then was) re-evaluated, re-assessed and re-analyzed the evidence before him and was satisfied the trial magistrate had arrived at the correct conclusion on the matter and on that account dismissed the appeal.

The appellant is now before us raising five (5) grounds of appeal in a homemade amended memorandum of appeal.

In summary, these read that the learned Judge erred in law:-

- **when he affirmed the decision of the trial court yet failed to find that *voire dire* examination was not done hence section 154 Cpc was not duly adhered (sic);**
- **when he upheld conviction and sentence yet failed to find that the identification was not conclusive as the same was not tested on an identification parade;**
- **when he upheld conviction and sentence while relying on an inconsistent and contradictory evidence;**
- **when he upheld conviction and sentence yet failed to find that the allegations raised were never proved under section 109 of the Evidence Act Cap 80 Laws of Kenya; and**
- **when he made a partial re-evaluation of the evidence on the record in favour of the prosecution.**

At the hearing of the appeal the appellant appeared in person while M/s **K. F. Nyakira** learned Prosecution Counsel appeared for the State.

The appellant adopted his written submissions basically reiterating the grounds of appeal already set out above. He asserts that the charge he faced is defective as framed. It ought to have read defilement contrary to section 8(1) which defines the offence as read with section 8(2) which describes the age of the victim. It should not therefore have been used as a basis for his conviction. Second, the trial was flawed on account of the trial magistrate's failure to conduct a ***voire dire*** examination on D, (PW2) and R.K.K, (PW3) both of whom were crucial witnesses for the prosecution. The failure to so conduct the ***voire dire*** examination on the said witnesses rendered their evidence not worthy of truth and should not have been

acted upon as a basis for either making a finding of guilt and conviction or affirming the same by the High Court. Third, evidence of both identification and the alleged recognition needed to be tested at an identification parade as PW 1 and 2 said that they did not know the appellant before the incident and did not see his face.

The appellant argued further that once the evidence of PW1 and 2 is discounted what the courts below were left with was the alleged recognition of the appellant by PW3 who never witnessed the incident. His evidence thus had no probative value. We were further urged to disregard PW3's evidence as unreliable because if it was true as alleged that the appellant was working in PW3's home then there is no explanation as to why he was not arrested immediately after the incident. There was no need to wait till 22nd September 2007 in order to arrest him.

Four, the two courts below failed to reconcile glaring inconsistencies, contradictions and discrepancies in the prosecution's evidence. Those that he pointed out in his submissions were as follows; that PW1 alleged it is only her who was told to lie down by the appellant contrary to what PW 2 said that both of them were told to lie down. Secondly, PW1, 2 and 3 stated that PW1 was defiled on 17.9.2007 at 4.00 p.m. contrary to the testimony of PW4 the clinical officer who said that he examined PW 1 on 18.9.2007 with an injury which was only two (2) hours old. In his view, if PW 4's evidence is correct then it is the defilement that allegedly occurred on 17.9.2007 per PW1, 2 and 3. The three PW1, 2, & 3 said nothing about the incident of 18.9.2007. No other witness linked the appellant to the incident that took place on 18.9.2007 two (2) hours before the examination of M.C., by PW4. There is therefore, nothing to pin the appellant to the alleged defilement of PW1.

On failure to tender crucial evidence, it was the appellant's assertion that although PW 4 talked of blood stained private parts of M.C. there was no mention about the clothing the victim had on, on the day of the alleged defilement. He wondered whether these had any blood stains on them, and if so why they were not they tendered. There was also mention about an underpants in the P3 form. No explanation was given as to why it was never tendered in evidence on it was not possible to conduct laboratory tests. The appellant urged us to find that had the learned first appellate Judge made a proper re-evaluation on the evidence before him, he would have arrived at the conclusion that the prosecution's case had not met the required threshold. He has urged us to allow his appeal and set him free.

In response, M/s **K.R. Nyakira** conceded that although all the three (3) key prosecution witnesses were minors, *voire dire* was conducted on M.C. (PW1) only and she could not identify the assailant. It is the other two, that is PW2 and 3 who were able to link the appellant to the sexual assault on PW1. **M/s Nyakira** urged us to go by the the record indicating clearly that the two witnesses were possessed of sufficient intelligence to understand the nature of the proceedings as demonstrated by the flow of their testimonies. They were also truthful. Their evidence was therefore properly acted upon by the two courts below both to find and affirm the appellant's conviction, which we were urged not to disturb.

M/s Nyakira urged in the alternative that should we find that the failure to conduct the *voire dire* examination on those two crucial witnesses vitiated the trial, we should order a re-trial as the error lay with the court. The witnesses, who are now adults, can easily be traced to give evidence.

Turning to the evidence on identification, **M/s Nyakira** urged that this evidence was safe and sufficient to sustain and affirm a conviction as PW 2 witnessed the incident while PW 3 recognized the appellant as the person who had taken PW1 and 2 into the bush with a promise of giving them rabbits.Both PW 2 and 3 had ample time to register the appellant's appearance.

With regard to the alleged existence of inconsistencies we were urged to hold that none exists as the evidence tendered forms a continuous chain of the history of what transpired. The appellant was therefore properly convicted properly affirmed by the first appellate Judge and we should not interfere.

To buttress her arguments learned counsel **M/s Nyakira** relied on the case of **Musembi Kili versus Republic [2013] e KLR** on the role of a first appellate Court and the case of **M.K versus Republic [2015] eKLR** for the proposition that it is only necessary to conduct a *voire dire* for a child of tender

years as defined in the Children's Act, that is below ten (10) years.

By dint of Section 361 of the Criminal Procedure Code, this Court is restricted to address itself on 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 are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See **Mwita versus Republic [2004] 2 KLR**. In **Kerongo versus Republic [1982] KLR 213** at P. 219 this Court said:-

> ***"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 a second appeal is whether there was any evidence on which the trial court could find as it had in Reuben Karari s/o Karanja versus Republic [1956] 17 EACA 146."***

In obedience to the above mandate, we have revisited the record and considered it in the light of the rival arguments set out above. In our view the following issues arise for our determination namely;-

(1) Whether the failure to conduct *voire dire* examination on two (2) crucial prosecution witnesses vitiated the trial case;

(2) Whether the evidence on the identification of the appellant as the assailant is water tight.

(3) Whether there were unreconciled glaring inconsistencies, discrepancies and contradictions in the prosecution case.

(4) whether material evidence was either withheld or ignored.

With regard to *voire dire* examination, there is no dispute that all the three crucial prosecution witnesses were children of tender years.The law obligated the learned trial Magistrate do conduct the *voire dire* examination on all of them to determine whether they understood the nature of the Oath and the obligation to speak the truth before allowing them to tender their evidence either as sworn or unsworn witnesses.This exercise was performed on only one that is M.C., the witness alleged to have been aged about seven (7) years. The other two also alleged to have been below ten(10) years at the time, were not subjected to the same exercise. The record does not bear any explanation for this deferential treatment. The judgment of the learned Judge is also silent on this issue.

In a recent decision of the Court in the case of ***Partrick Kathurima versus Republic (2015) eKLR*** the Court had occasion to revisit the importance of undertaking this exercise, on this category of witnesses. The sentiments expressed by the Court in the ***Kathurima Case*** (supra) were approved and adopted in another yet recent case of ***D.W.M.versus Rebublic*** (2016)eKLR thud:-

> ***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.***
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> ***12. In Patrick Kathurima versus Republic Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed thus:-***
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> ***"It is best, though not mandatory, in our context that the questions put and the answers given by***

the child during voire 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 voire 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 questions put and the answers given by the child during the voir dire examination be recorded..."

That is the correct position in law. It therefore follows that the learned trial Magistrates' failure to conduct the *voire dire* examination on the other two crucial witnesses was fatal to the prosecution case considering that these were taken as the "eye" witnesses to the alleged sexual assault on M.C. who could not herself identity the assailant.

With regard to the identification PW1 and 2 said they could not identity the appellant as they had never seen him prior to the date of the incident. It is PW3 who did. The learned trial Magistrate had this to say about this evidence;-

"The prosecution witnesses PW1 & PW3 have given a clear account of how they met the accused who told them he would get them rabbits PW1 stated clearly how the accused removed her clothes and his and defiled her. PW2 watched all that happened and PW3 had known the accused prior to that day. He positively identified the accused as the person whom they met at the river and the one who went with PW1 and PW2 to the bush to get rabbits but never came back".

The High Court, dismissing the appeal had this to say:-

"This is a case which(sic) identification parade ought to have been held. The only evidence was that of Ronald, PW3 who told the trial court that the assailant was employed at his home and that he knew him. In effect he case was based on evidence of recognition by a single witness. Before basing a conviction on such evidence; the court must be left in no doubt that the witness clearly recognized the suspect and that the circumstances in which he did so leave no room for doubt. The duty of the court is to ensure that the accused was the person seen by the witness and that conditions obtaining at the time of seeing the accused were conducive to proper recognition and that there was no mistake as regards the identity of the person who the witness saw. In the present case, Ronald saw the appellant during broad day light. The appellant was known to him. He worked as an employee in his home. There were not circumstances that would have created conditions to undermine proper recognition"

The testimony of PW3, the two courts below relied on keenly in support of the conviction was evidence of a witness who did not witness the sexual assault. Moreover it was evidence of a single witness, a minor witness for that matter which needed careful consideration. We find none on the record as this scrutiny could only have been possible if the **voire dire** examination had been administered on him.

As for alleged unreconciled inconsistencies and contradictions in the prosecutions case, we have no doubt these were real as outlined above. The court below has a duty to reconcile them and determine whether they are curable under Section 382 of the CPC or not. See the case of **Vincent Kasyula Kingoo Nairobi Criminal Appeal No. 98 of 2014** in which the Court approved the holding in the case of **Josiah Ajuma**

Angulu versus Republic, Criminal Appeal No. 277 of 2006 (UR) and Charles Kiplang'at Ng'eno versus Republic: Criminal Appeal No. 77 of 2009 (UR) in both of which the Court reiterated that where inconsistencies and discrepancies are identified, in the prosecution case, they have to be reconciled to determine whether they are minor and could therefore be ignored or they go to the root of the prosecution case.

The discrepancy in the possible date of the commission of the offence considering that PW4 stated that he examined the victim on 18th September, 2007 only two hours after the alleged sexual assault in contrast to what PW1, 2, and 3 had said the sexual assault took place on 17th September, 2007 needed to be reconciled. It was not.

The under pant and clothing M.C had on on the material date were not tendered in evidence. Also not tendered was evidence on how the appellant was arrested although the fact of the arrest is not in dispute. As for the evidence of the investigating officer, all we have is the testimony of PW5 that he was handed the file by an officer who had gone on transfer. It is our view that the evidence of the investigating officer would have shed light on what became of the under pant and the clothing the victim wore on the date of the incident.

The question we have to ask ourselves is what is the consequence of all the above. The state asked for a re-trial, while the appellant asked for an outright acquittal. It is now trite that whether or not there should be a re-trial or not is an issue of justice depending on the circumstances of each case.

In ***Bernard Lolimo Ekimat –vs- R- Criminal Appeal No. 151 of 2004*** the Court stated: -

> ***"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

Further, in ***Muiruri –vs- R (2003) KLR 552*** this Court at page 556 observed: -

> *"**Generally whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (see Zededkiah Ojoundo Manyala –vs- R Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the Court's."***

We note the assurance of M/s Nyakira that the witnesses, who are now adults, can easily be recalled to testify. We appreciate the appellant has been incarcerated since 2007. However both sides have to be accorded justice. In an instance where it is the court which is found to have been at fault, justice demands that the victim be vindicated. Such vindication can only come from a retrial.

In the result we allow the appeal and set aside the findings of the two courts below. We direct that the appellant be presented before the Magistrate's Court at Bomet within 14 days of this order for expeditious hearing and disposal of the case before any Magistrate other than **T. O. OKELLO**. Orders accordingly.

Dated and delivered at Nakuru this 27th day of April, 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