



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CRIMINAL APPEAL NO. 68 OF 2015

BETWEEN

MARIPETT LOONKOMOKAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Mombasa (Muya, J.) dated 18th April, 2013

in

Criminal Appeal No.456 of 2010)

JUDGMENT OF THE COURT

The appellant brings this appeal to challenge the dismissal of his first appeal to the High Court following his conviction and sentence to a term of 20 years imprisonment by the Principal Magistrate’s Court at Kwale for defiling a girl whose age was given in the charge sheet as 10 years. In this appeal he contends that the learned Judge of the High Court (Muya, J) erred in confirming the conviction and sentence without proof of the complainant’s age beyond reasonable doubt; and that the learned Judge also failed to see that the complainant’s evidence was irregularly received and admitted without subjecting it to *voir dire* examination. To persuade us the appellant, who was unrepresented by counsel relied on the cases of **John Muiruri v R** (1983) KLR 445 and **Kaingu alias Kasomo v R** Criminal Appeal No.504 of 2010.

Mr.Wamotsa learned counsel for the respondent opposed the appeal arguing that, although *voir dire* examination was not conducted, the High Court properly found that that failure did not vitiate the appellant’s trial; that the effect of failure to conduct *voir dire* will normally depend on the circumstances of each case; that the complainant’s age of 9 years was proved by the evidence of the complainant herself and that of the clinical officer which also sufficiently corroborated the complainant’s evidence.

This Court by the provisions of **section 361** of the Criminal Procedure Code cannot entertain a second appeal unless the question involved is one of law and we emphasize that erroneous findings of fact

or an appreciation of the relevant evidence will not constitute a ground in a second appeal. See also **Karingo v R** (1982) KLR 213. We are however satisfied that we have jurisdiction to entertain this appeal on the two broad questions it raises, the *voir dire* examination of a child witness and the proof of age.

This is how the two questions arose. The appellant, from the Maasai community, who gave his age at the hearing of this appeal as 32 years, was offered the complainant as a bride by the latter's parents. There is evidence on record that the appellant paid two visits to the complainant's parents. On the first occasion he was accompanied by one person while on the second one, when he is said to have paid dowry, he was with two people. On that day upon the payment of dowry, the complainant's father also released his 7 year old son to go with the appellant to be raised by him and the complainant. According to the complainant, on her first night at the appellant's home near Loitoktok he removed her clothes and defiled her. He beat her up with a stick to stop her from crying as she felt pain in her private parts. At some point they relocated to the coast and settled in Kibundani of Msambweni, Kwale County. For the next five days before the complainant was rescued by a good Samaritan, PW2, the appellant repeatedly sexually abused her. The good Samaritan heard of her tribulations from the neighbours who complained that the appellant had a relationship with an under age girl who he would beat every night.

The complainant was taken to the hospital after the matter was brought to the attention of the police. PW4, the clinical officer examined her private parts and noted that the hymen was not intact and *libia majora* lacerated. The appellant was arrested and charged under **section 8 (2)** of the Sexual Offences Act, with defiling a girl aged 10 years. Both courts below made the following concurrent factual conclusions. That the appellant took the complainant as his bride after paying dowry; that he sexually penetrated her private parts; that the complainant was a child within the meaning of the Sexual Offences Act; that being of the age of between 9 – 10 years an offence under **section 8 (2)** of the Act was proved. The trial court imposed a sentence of 20 years, which was in turn confirmed by the High Court.

Regarding the complainant's age the learned Magistrate relied on the testimony of the complainant to the effect that at the time of the trial she was 13, having been born in 1999. The Magistrate relied also on the medical evidence of the clinical officer who not only examined her in connection with defilement but also assessed her age at 9 years.

The question of age, as we have stated earlier is a question of law under the Sexual Offences Act, at least to prove that the victim was a child at the time of defilement and also for purposes of sentence. However the question whether the complainant was 9, 10 or 13 is a question of fact with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises.

We can only reiterate what has been said before that at a certain age and in this day and age a child of a certain age bracket is able to give his or her age accurately.

The complainant was a pupil in a boarding primary school. So that her statement that she was 13 years in 2012 must be taken to be accurate. She repeatedly stated that she

was born in 1999. At the time of the offence in 2010 she was 11 years. **Section 8 (2)** of the Sexual Offences Act only requires proof that the victim is a child aged eleven (11) years or less. Once this is demonstrated the prescribed punishment is life imprisonment.

The trial Magistrate, who had the opportunity to observe the demeanour of the appellant and who on the evidence before him was satisfied that the complainant could not be more than 10 years old, dismissed the defence suggestion that she was 19 years. The court noted that;

“From the court's own observation, the complainant is a tiny girl who is barely in her puberty. All other witnesses in their evidence made reference to the small girl. It was

obvious that

she cannot have been more than 10 years when the offence occurred. On cross-examination and in the defence, it was suggested that accused was deceived to believe that the girl was 19 years old... there was no way the accused would have believed the complainant was even 10 years old leave alone 19 years”.

Having made a definite factual finding that the complainant was 10 years, it is not clear on what basis the sentence of 20 years was arrived at. The High Court similarly missed the point by holding that the sentence was lawful. We shall return to this question at the end of this judgment.

We turn to consider the effect of failure by the trial court to administer *voir dire* on the complainant. It is firmly settled that not in all cases that *voir dire* is not

administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate 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.

Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts

by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under **section 233** of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. *Voir dire*, a latin phrase (*verum dicere*) for saying “what is true”, “what is objectively accurate or honest” has been used in most Commonwealth jurisdictions and in some instances in the United States of America,

as “a trial within a trial”, 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**. But the origin of the rule on *voir dire* examination of a child witness as we know it today was first applied in the ancient yet landmark English case of **R v Braisier** (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that;

“.. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence”(our emphasis)

Although this decision, through **section 19** of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children’s testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that *voir dire* examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child’s answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See **Johnson Muiruri v R (1983) KLR 447**. The courts today accept both the question and answer format and the recording of the child’s answers only. See **James Mwangi Muriithi** (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of **sections 208** and **302** of the

Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006.

It is clear to us from the record that the trial Magistrate deliberately did not conduct *voir dire* examination for he believed, erroneously, that the complainant was not a child of tender years. The record reads thus;

“PW1 F/c (Female child) not of tender years sworn states in Kiswahili.” The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years” is **section 2** of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir 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 voir 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 *voir dire* examination. The complainant’s evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant’s evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement.

The evidence that the appellant was misled by the father of the complainant that she was 19 years cannot avail him a defence under **section 8 (5)** of the Sexual Offences Act. It would only be a defence if;

- i. it was proved that the complainant herself deceived the appellant in believing that she was over the age of eighteen years at the time of the offence, and
- ii. it was proved that the appellant reasonably believed that the complainant was indeed over the age of eighteen years.

He must also, in terms of sub-section 6, demonstrate the steps he took to ascertain the age of the complainant.

It was apparent to those who alerted the good Samaritan as it was to the good Samaritan herself, the police officer who received the report at Diani Police Station (PW3) and the Clinical Officer that the child was under age. The trial Magistrate before whom the complainant testified noted that;

“From the court’s own observation, the complainant is a tiny girl who is barely in her puberty.... there was no way the accused would have believed complainant was even 10 years old...”

We find, on the basis of the foregoing, no substance in this appeal. We accordingly dismiss it.

Regarding the sentence, since neither the appellant nor the respondent have complained we shall not disturb the imprisonment term of 20 years imposed by the trial court and confirmed by the High Court. In any case, since the appellant's attention was not drawn to that sentence and the consequences of his appeal being dismissed, it will occasion a miscarriage of justice to interfere with the sentence.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR