IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, WARSAME & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 65 OF 2013

BETWEEN

MICHAEL KIONGO WAITITU…………………...………… APPELLANT

AND

REPUBLIC ……………………………………………...… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Achode, J.) dated 17th April, 2013

in

H.C.CR.A No. 530 of 2009)

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JUDGMENT OF THE COURT

1. Michael Kiongo Waititu, the appellant herein was charged with one count of defilement contrary to ***Section 8(1) & (2)*** of the ***Sexual Offence Act*** and an alternative count of committing an indecent act with a child contrary to ***Section 11(1)*** of the ***Sexual Offences Act*** in the Resident Magistrate's Court at Gatundu. The particulars of the main charge were that on 14th May, 2008 at around 4:30 p.m. in Thika District within the then Central Province, the appellant intentionally and unlawfully committed an act which caused penetration to **SWW**, a girl aged 10 years. On the alternative charge, the particulars were that on the above mentioned date and place, the appellant committed an indecent act with **SWW,** a girl aged 10 years by touching her genital organs.

2. The appellant pleaded not guilty to both charges and the prosecution called a total of six witnesses in support of its case. It was the prosecution's case that on 14th May, 2008 at around 4:00 p.m. M W M (PW3) sent her daughter SWW (PW1) to the Market to purchase foodstuff. While on her way to the market, she met with the appellant who dragged her into a coffee plantation and forced her to lie on her back; he tore her biker which was underneath her dress and proceeded to defile her. SWW then screamed out of pain and the appellant ran away. She got up and went to a nearby kiosk which was owned by E W W (PW2) and informed Esther what had happened.

3. Esther escorted SWW home and informed her mother about the incident. They both examined SWW's private parts and noticed blood thereon. As SWW's mother had delivered a baby four days before the incident, Esther then took the minor to hospital where she was examined and later reported the incident to

the police the following day. Subsequently, the appellant was arrested, arraigned and charged in court.

4. In his defence, the appellant gave an unsworn statement. He denied committing any of the offences and maintained that he had been framed. He testified that on 19th May, 2008 after taking breakfast he went to a workshop where he was training to be a mechanic and thereafter left to dig a grave in a neighbouring homestead. He was arrested by some elders as he was leaving the homestead and subsequently charged.

5. After considering the evidence tendered, the trial court convicted the appellant on the main count and sentenced him to life imprisonment. Aggrieved with the decision, the appellant filed an appeal in the High Court against both the conviction and sentence. By a judgment dated 17th April, 2013 the High Court (Achode, J.) dismissed the appeal. Unrelenting, the appellant has now filed this second appeal faulting the High Court for basing his conviction on a defective charge and insufficient evidence; and further confirming the sentence meted against him which was excessively harsh.

6. At the hearing of the appeal the appellant relied on his written submissions. He submitted that the charge as drawn was defective, in that it neither indicated the organ used to cause penetration nor the minor's organ which was allegedly penetrated contrary to ***Section 2*** of the ***Sexual Offences Act***. According to him, the prosecution had not proved to the required standard the age of the minor which was fatal to the prosecution's case. He argued that there was no medical evidence connecting him to the offence. The appellant also faulted the trial court for failing to conduct a fresh *voir dire* examination on the minor who had been recalled to testify afresh. He finally submitted that the prosecution had not proved its case to the required standard and urged us to allow his appeal.

7. The Assistant Director of Public Prosecution, Mr. B.L. Kivihya, in opposing the appeal, submitted that the charge was not defective. He argued that identification was not an issue since the appellant was well known to the minor. According to him, the prosecution's case was watertight. He submitted that the High Court properly re-evaluated the evidence and came to the right conclusion. He urged us to dismiss the appeal.

8. We have considered the record, submissions by counsel and the law. By dint of ***Section 361*** of the ***Criminal Procedure Code*** we are restricted to only consider matters of law in this second appeal. In ***Chemagong -vs- R(1984) KLR 213*** at page 219 this Court held,

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja- vs-Republic 17***
>
> ***EACA146)."***

Taking into account the foregoing we find that the following issues arise for determination:-

- ***Whether the charge as drawn was defective and if so, what is the consequence thereof?***

- ***Whether voir dire examination was properly conducted and if not, what is the consequence thereof?***

- ***Whether the age of the complainant was established.***

- ***Whether the prosecution's case was proved to the required standard?***

- ***Whether an issue of severity of sentence can be entertained by this Court?***

9. Section 134 of the ***Criminal Procedure Code*** requires that every charge should be precise and abundantly clear to the appellant. It provides that:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

Section 8(1) of the ***Sexual offences Act*** provides:-

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

Further, ***Section 2(1)*** of the ***Sexual Offences Act*** defines penetration as follows:-

"Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

10. Did the omission to state which of the appellant's organ penetrated the minor and/or which organ of the minor was penetrated render the charge defective? Dealing with the framing of a criminal charge in the case of ***Willie (William) Slaney –vs- State Of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391]***, the Supreme Court of India held that:

"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form.

To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent."

Their Lordships further held:

"We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms that it must all be "explained to him", so that he really understands … but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality. … <u>The essence of the matter is</u> <u>not a technical formula of words, but the reality. Was he told? Was it explained to him? Did he understand? Was it done in a fair way?</u>" Emphasis added.

11. As regards irregularities in the framing of the charge, their Lordships in the above mentioned case opined that:

"Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

In our view, the said omission did not in any way prejudice the appellant because from the record it is quite clear that he knew the nature of the charge against him. We further find that the said omission is curable under ***Section 382*** of the ***Criminal Procedure Code***.

It provides:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in an inquiry or other

proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

12. From the particular circumstances of this case, we find that the irregularity (if any) did not occasion a miscarriage of justice. On voir dire, the trial court indicated as follows,

"Court had already conducted voir dire examination of the minor and satisfied itself that she understood the meaning of an oath and was admitted to give sworn evidence. She has been called to testify a fresh as the case has to start a fresh, the original file having been destroyed in the fire that gutted the court on 18th May, 2009."

The appellant's contention as we understand is that in light of the fact that the minor had been called to testify afresh, the trial court ought to have conducted a fresh *voir dire* examination to establish the veracity of her evidence.

13. 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***. While considering the said provision this Court in ***D W M –vs- R [2016] eKLR*** observed that the same did not provide a format to be applied in conducting *voir dire* examination but that the format had basically evolved through case law. Citing the case of ***Sula –vs- Uganda [2001] 2EA 556*** the Court stated,

"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."

Back home, this Court in ***Patrick Kathurima –vs- R (2015) eKLR*** 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."

14. What was the consequence, if any, of the trial court's remarks on the *voir dire* examination? In ***D W M –vs- R [Supra)*** the learned trial magistrate did not reflect in the record the questions put to H.W., a minor, during the *voir dire* administration and this Court in that regard held,

"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. In this case the minor in her evidence was coherent and never faltered in her responses to questions put to her by the appellant during cross examination. To us that was a clear indication that she was intelligent and had a good grasp of the events that occurred during the incident. Furthermore, the trial court found that the minor was a truthful witness and we see no reason to interfere with such finding taking into account the sentiments of this Court in ***Nelson Julius Karanja Irungu –vs- R (2010) eKLR*** set out herein below;

> ***"As this court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."***

16. Both lower courts made concurrent findings that the prosecution had proved its case beyond reasonable doubt. There was no eye witness to the incident and the only evidence as to what transpired was given by SWW. The proviso to ***Section 124*** of the ***Evidence Act*** provides:-

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

17. From the evidence on record, SWW gave a detailed account of what transpired on the material day. She testified that the appellant dragged her into the coffee plantation, forced her to lie down and tore her biker; he inserted his penis into her vagina and she bled. Medical evidence confirmed that the minor's hymen was torn and that she sustained injuries which were consistent with traumatic sexual intercourse. This evidence established that there was penetration on the minor.

18. As to the identity of the perpetrator, SWW was categorical that it was the appellant who defiled her. It was her uncontroverted evidence that she knew the appellant who was a neighbour prior to the incident. We concur with the two lower courts that this was not a case of mistaken identity but of recognition. In ***Anjononi & others -vs- R (1976-80) 1 KLR 1566,*** this Court held at page 1568,

> ***"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

19. On the issue of the age of the complainant, the minor's mother testified that minor was born in the year 1998 and produced an immunization card to corroborate the same. We also note that the P3 form clearly indicated that the minor was 10 years. This Court faced with a similar issue in ***Stephen Otieno Wambi –vs- R (2015) eKLR*** held,

> ***"Therefore actual age need not be proved. What is important is that the court believes apparent age which is proved.***
>
> ***In this case there was the evidence of the medical doctor to the effect that the complainant was nine years old. This evidence was believed by those courts and there is no error in the manner that issue was treated by those courts."***

Further, in ***Richard Wahome Chege –vs- R (2014) eKLR*** it was held,

> ***"On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the***

complainant, and the complainant herself."

We concur with the two courts below that the minor's apparent age was 10years at the material time.

20. Lastly, on the issue of sentence ***Section 8(2)*** of the ***Sexual Offences Act*** provides ,

> ***"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."***

As this Court had correctly observed in ***Stephen Nguli Mulili –vs- R (2014) eKLR*** the ***Sexual Offences Act*** removed discretion in sentences particularly where the victims are minors. Therefore, the sentence provided under ***Section 8(2)*** is mandatory and not discretionary. We find that the sentence of life imprisonment issued to the appellant was lawful.

21. Having expressed ourselves as herein above we find that the appeal lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 8th day of July, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR