IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, KOOME & OKWENGU, JJ.A

CRIMINAL APPEAL NO.44 OF 2015

BETWEEN

PAUL KINYANJUI KIMAUKU alias GEORGE…….……APPELLANT

AND

REPUBLIC……...…….....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbogholi, J.), dated 13th March, 2013

in

H.C. Cr. No. 319 OF 2016)

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JUDGMENT OF THE COURT

[1] ***Paul Kinyanjui Kimauku*** alias ***George*** who is the appellant before us, was tried and convicted in the Magistrate's Court at Limuru, for the offence of Defilement under section 8(1) of the Sexual Offences Act. He was sentenced to life imprisonment. Being aggrieved, he appealed to the High Court. The appeal was heard by Mbogholi, J. who in a judgment delivered on 13thMarch, 2013, dismissed the appeal. The appellant is now before us in a second appeal.

[2] During the hearing of his appeal, the appellant relied on an amended memorandum of appeal in which he raised 8 grounds. In a nutshell, the appellant contends that the learned Judge of the High Court erred in failing to critically re-evaluate the evidence adduced in the lower court, and as a result arrived at erroneous conclusions such as the identification of the appellant. Further, that the learned Judge upheld the conviction of the appellant based on conclusions anchored on insufficient, disjointed and contradictory evidence; that the conclusions were not supported by the evidence on record; that the learned judge failed to note that the burden of proof was irregularly shifted to the appellant; the appellant's defence was not considered; and finally that the learned judge failed to consider the defect on the charge sheet.

[3] In arguing the appeal, learned counsel Mr. Mbugua Mureithi who appeared for the appellant pointed

out that there was no evidence of any description, that was given of the person who accosted the complainant; that the circumstances leading to the appellant's arrest were unclear as the arresting officer was not called to testify; and consequently, the identification of the appellant was mere dock identification.

[4] Mr. Mbugua Mureithi relying on ***Dennis Leskar Loishiye vs Republic, Court of Appeal at Nairobi, CRA No.24 of 2015 [2015] eKLR*** argued that the learned Judge failed to properly evaluate the evidence and therefore failed to note that the evidence regarding the arrest and identification of the appellant was inconsistent.

[5] In addition, counsel argued that the two lower courts erred in relying on the evidence of ***GN M*** (PW3), (***G***) a minor who did not appreciate the meaning of an oath, and who was not examined on the importance of speaking the truth; and failed to note that the appellant was prejudiced in his defence as he was not given an opportunity to cross-examine this witness. The appellant further relied on the following authorities: ***James Chege Wanja & another vs Republic, Court of Appeal at Nyeri, CRA No.323 of 2011 [2014] eKLR, James Mwangi Muriithi vs Republic, Court of Appeal at Nyeri, CRA No.10 of 2014 eKLR*** and***Julius Kiunga M'Birithia vs Republic, High Court (Meru) CRA No.111 of 2011 [2013] eKLR.***

[6] Mr. Kivihya, Assistant Deputy Prosecutions Counsel, who appeared for the State opposed the appeal and urged the Court to uphold the appellant's conviction and sentence. On the issue of identification, counsel ruled out mistaken identification contending that the evidence of the complainant and ***G*** who referred to the appellant by name as "***George***" put the appellant at the scene of crime and that the appellant was known to the minor complainant.

[7] Further, counsel submitted that the evidence of the complainant was adequately corroborated by the evidence of the Doctor and the P3 Form which showed that the minor complainant had a tear in his anus; that the failure by the prosecution to call the arresting officer to testify was of no consequence; nor was the confusion regarding the name of the school prejudicial to the appellant; that the appellant was represented by counsel who did not raise any issue regarding the cross-examination of PW3; and that these were minor irregularities curable under section 382 of the Criminal Procedure Code. The Court was therefore urged to uphold the concurrent findings of the two lower courts and dismiss the appeal.

[8] This being a second appeal, the jurisdiction of this Court is limited under Section 361 of the Criminal Procedure Code, to considering matters of law only. As stated in ***Kaingo vs Republic [1982] KLR 213*** such an 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 second appeal is whether there was any evidence on which the trial court could find as it did.*** *(Reuben Karari S/O Karanja versus Republic [1950 17 EACA 146].***"**

[9] The following caution restated in ***M'Riungu vs Republic [1983] KLR 455*** is of importance:

> ***"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decisions is bad in law (****Martin vs Glyneed Distributors Ltd (t/a MBS Fastenings****)."***

[10] In this case, the appellant has properly invoked the jurisdiction of this Court as he has raised various issues of law such as: the failure by the first appellate court to discharge its obligation of reconsidering, reanalyzing and reevaluating the evidence that was adduced in the lower court; the issue of identification; whether the appellant's right to a fair trial was breached; and whether the appellant's defence was wrongfully rejected.

[11] In regard to the duty of the first appellate court, the following passage from ***Okeno vs R*** ***[1972] EA 32***, is instructive:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination*** *(Pandya v. R., [1957] EA 336)****, and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions*** *(Shantillal M. Ruwala vs. R [1957] EA 570)****. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions."***

[12] The above then, is the yardstick that this Court must use to determine whether the learned judge of the High Court properly discharged his mandate. It is clear that the learned Judge was alive to his obligation as a first appellate court as in his judgment, he appreciated the need to go through the entire evidence to arrive at independent conclusions. The question is whether the learned Judge actually did this. The learned Judge considered the evidence that was adduced by the minor complainant and his mother, as well as the evidence of ***G*** and ***Dr. Kioko*** who examined the complainant after the incident and filled a P3 Form confirming that he had indeed been defiled. The learned Judge noted that although the complainant did not previously know the person who had sodomised him, he knew that other children called the man ***"George"***. Given that the appellant raised a defence of mistaken identity, it is clear that the issue of identification was crucial.

[13] The learned Judge noted that the appellant was arrested upon being sighted by the minor complainant. This implies that the appellant was arrested upon being identified by the minor complainant. Indeed, the complainant's mother stated that the complainant saw the appellant a week later, he informed her, and she informed the police. Consequently, the appellant was arrested. However, nowhere in his evidence did the complainant mention causing the appellant to be arrested, or having sighted the appellant after the sexual assault.

[14] Of greater concern, is the fact that the arresting officer was not called to testify. The evidence of ***Corporal John Kajala*** the investigating officer who testified that he instructed the Administration Police Officers to arrest the appellant, did not offer much help. Notwithstanding the fact that the investigation officer conceded that he did not know the appellant before nor did he know where the appellant lived, he did not offer any information regarding who identified the appellant and connected him with the offence; or how the appellant was arrested.

[15] We note that both the complainant and his friend ***G*** purported to identify the appellant in court as ***George***. This identification would have been credible if there was evidence tendered of a description having been given by the witnesses before the appellant's arrest, such as was sufficient to identify the appellant as the said ***George.*** In the absence of such evidence and there being no evidence of the witnesses having identified the appellant at an identification parade, the identification of the appellant was no more than dock identification that could not be relied upon. Indeed, given the confusion in the evidence of the complainant and ***G*** regarding the names of the schools, the possibility of a genuine mistake having been made regarding the identity of the person who molested the minor complainant, cannot be ruled out.

[16] Further, while the evidence of the complainant was adequately corroborated by the evidence of the doctor and the P3 Form, the corroboration was limited to the fact that the minor complainant was sexually assaulted and not corroboration regarding the identity of the person who assaulted him. Thus, there was a *lacuna* in the evidence that created a doubt regarding the identification of the appellant as the person who assaulted the minor complainant, and that doubt ought to have been resolved in the appellant's favour.

[17] In addition, both the complainant and his friend ***G*** who were key witnesses against the appellant were minors of tender years. In ***Johnson Muiruri vs Republic*** ***[1983] KLR 445***, it was held *inter alia* that:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* ***examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."***

[18] The trial magistrate carried out what purports to be a *voire dire* examination of both the complainant and ***G*** who were children. In regard to the complainant, this is what is recorded:

"E C. I am 8 years. I am Limuru Model in Standard 1*(sic).* ***I go to church and attend Sunday school. If you tell lies you go to hell when you tell lies. I was number 40 in class. We are not very many. My mother is called B M. We live in Limuru town.***

Court: The child is intelligent to appreciate the meaning of oath to give sworn statement."

[19] In regard to ***G***, this is what the court recorded:

"G N. I am 6 years. I am in Standard 1. [particulars withheld] Primary School. I do not go to church. If I tell lies I will be beaten. Nobody has ever taught me about lies and truth.

Court: Child to give unsworn statement. He does not appreciate the meaning of oath."

[20] [20] First, we reiterate what the Court stated in ***Johnson Muiruri vs Republic*** (supra) that:

"(4) 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.

(5) A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

(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 the oath. The failure to do so is fatal to the conviction."

[21] From the examination of the minor complainant, it is evident that the trial magistrate's examination was limited to the minor's intelligence and ability to speak the truth. He did not address the minor's ability to understand the nature and solemnity of an oath. Thus, there was nothing to justify the trial magistrate's conclusion that the child could appreciate the meaning of an oath which was the first requirement before his evidence could be taken on oath.

[22] In regard to ***G***, the answers reveal that not only was he not intelligent enough to understand the solemnity of an oath, but he also did not understand the responsibility of speaking the truth as he says nobody has ever taught him about lies and truth. We find that the *voire dire* examination carried out did not justify the evidence of the minor complainant being received on oath or the evidence of ***G*** being received. This was not a minor irregularity that could be cured under section 382 of the Criminal Procedure Code.

[23] Again, the record reveals that following the evidence of ***G*** that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the Constitution, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a

minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined.

[24] We note that although the learned Judge reconsidered the evidence that was adduced before the trial court, he did not address these pertinent issues that ought to have formed the subject of his analysis of the Sentence. Had he done so, he would have no doubt found that the finding of the trial magistrate could not be sustained.

[25] Accordingly, we come to the conclusion that the learned Judge of the High Court did not satisfactorily perform his mandate. Consequently, we allow the appeal, quash the appellant's conviction and set aside the sentence of life imprisonment. The appellant shall be forthwith released unless otherwise lawfully held.

Dated and Delivered at Nairobi this 9th day of December, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR