



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

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

CRIMINAL APPEAL NO. 131 OF 2014

BETWEEN

PATRICK KATHURIMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Kenya at Meru (Gikonyo, J)

dated 22nd October, 2013

in

H.C.CR.A. NO. 158 OF 2008)

JUDGMENT OF THE COURT

Patrick Kathurima (the appellant) was charged, tried and convicted by the Senior Principal Magistrate at Meru on a charge of defilement contrary to **Section 8(1)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on the 4th day of April 2008, in Meru Central District of Eastern Province, he defiled DK a child aged 13 years. That conviction earned him a sentence of 20 years imprisonment. His appeal against both was on 22nd October 2013 dismissed by the High Court sitting at Meru (Gikonyo J), hence the present appeal.

At the hearing of the appeal, the appellant's learned counsel Miss Nelima abandoned a four-ground Memorandum of Appeal previously filed by the appellant in person and instead argued the grounds in her Supplementary Memorandum of Appeal dated 8th June 2015 raising the following points of law;

- **The Magistrate's failure to conduct a *voir dire* on the child complainant vitiated the trial.**
- **The learned Judge failed to conduct a fresh and exhaustive evaluation of the evidence in entirety.**

- **The learned Judge upheld a conviction based on scanty and inconclusive medical evidence.**

Arguing the appeal before us, Miss Nelima submitted that the complainant (DK) having been a child of 13 years, there was a mandatory requirement that her evidence be preceded by a *voir dire* examination before its reception, if at all, and she cited **Section 19(1) of the Oaths and Statutory Provisions Act, Cap 15**, for that proposition. That provision, in relevant part, is as follows;

“where, in any proceeding before any Court...any child of tender years called as a witness does not, in the opinion of the Court ...understand the nature of an oath, his evidence may be received, though not given on oath if, in the opinion of the Court...he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth;...”

Counsel submitted that in so far as the trial court did not first examine DK to determine her competence as a witness, there was miscarriage of justice and the ensuing conviction was untenable and ought to be quashed. She cited the cases of **NYASANI S/O BICHANA –VS- REPUBLIC** [1958] EA 190 and **KIBANGENY ARAP KOLIL –VS- REPUBLIC** [1959] EA 92.

Turning to the second ground, counsel submitted that both courts below evaluated the evidence before them only selectively. She faulted the High Court for not discharging its bounden duty of subjecting the entire evidence to a thorough and exhaustive reevaluation, re-assessment and re-analysis before arriving at its own independent conclusions. That duty has been stated in a long time of cases including the oft-cited **OKENO –VS- REPUBLIC** [1972] EA 32. Had the learned Judge done so, asserted counsel, he would have come upon contradictions and gaps in the prosecution evidence that should have led to the appellant’s acquittal. She lambasted the prosecution’s failure to establish the evidence of the injuries allegedly suffered by DK during the defilement, pointing out that a failure to mention the age of the injuries in a sexual assault rendered the medical evidence tendered to establish it quite worthless. She cited in aid the case of **BEN MAINA MWANGI –VS- REPUBLIC**, [2001] KLR 187, a decision of the High Court (Lesiit J). Counsel concluded by stating that those gaps might have been sealed had the prosecution called certain vital witnesses such as the hotel operator and shopkeeper who might have confirmed that DK was with the appellant the night she was allegedly defiled. Those witnesses were however not called and Miss Nelima thought that the prosecution thereby appeared to have had something to hide. Meeting the appellant’s argument in reverse order, Mr Mungai, the learned prosecution counsel maintained that there was sufficient evidence from DK to show that the appellant met her on the material night at the market where she was looking for a job in a hotel, bought her tea, bought maize flour at a shop, and took her to his house promising to send her to Nairobi to work as a house help. A few metres from his house, he undressed DK and defiled her with the warning to neither scream nor tell his wife what he had done or else he would kill her. When he finished defiling her, the two went to his house where he introduced DK to his wife who gave the two supper and she spent three nights there. When she left on Monday morning not having been taken to Nairobi, she went to her grandmother and told her she had been kept at the accused’s house. The grandmother sought assistance from the chief and the matter was reported to the police who later arrested and charged the Appellant. According to Mr. Mungai, the failure to call the hotelier and the shopkeeper was not fatal as there were other witnesses who testified, such as the chief to whom the matter was reported. Counsel contended that what discrepancies there were in the prosecution’s evidence, especially with regard to the times mentioned by DK, which were contradictory, were not material and were, moreover, curable under **Section 382** of the **Criminal Procedure Code (CPC)**.

Mr. Mungai conceded that from the P3 Form tendered in evidence as well as from the evidence of Dr. Isaac Macharia (PW6) no age of injuries was stated. Indeed, the P3 was not indicative of any injuries as the state of DK’s genitalia was described merely as “**Hymen broken**” which the doctor said was indicative of her having had sexual intercourse, and no more.

Counsel was of the curious view that it is not possible to state or establish the age of injuries in sexual offences.

Turning to the issue of the absence of a *voir dire* examination, Mr. Mungai conceded that the trial court had not addressed the issue at all and conceded further that were DK's evidence to be excluded on that account, the rest of the evidence was insufficient to sustain the charge. He nevertheless urged us to uphold the conviction and sentence as the courts below did warn themselves on the dangers of relying on DK's evidence alone before convicting the appellant.

Replying to that last submission alone, Miss Nelima submitted, correctly in our view, that the issue of DK's age, hence the necessity for *voir dire* examination went to her competency to give evidence in the first place, and not merely the probative value thereof. That much is clear from the provisions of the **Oaths and Statutory Provisions Act** that we set out earlier on in this judgment. It was a fatal error on the part of the trial Magistrate not to have first addressed the issue of DK's competency to testify in the first place, and if so whether on oath or unsworn, given that the charge sheet indicted her age to have been 13 years. That was the first thing she said in her evidence and was also stated upfront by her grandmother (PW2) and her age was therefore established. See **STEPHEN NGULI MULILI –VS- REPUBLIC** [2004] e KLR, cited to us by Mr. Mungai.

Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this Court in **MOHAMMED –VS- REPUBLIC** [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in **KIBANGENY –VS- REPUBLIC** (Supra) that the expression “*child of tender years*” for the purpose of **Section 19** of the [Act] means, “*in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years.*” That indicative age has been followed by courts ever since, See, for instance, **JOHNSON MUIRURI –VS- REPUBLIC** [1983] KLR 445, where this Court, in respect of a 13^{1/2} year old child approved the step taken by the trial court;

“The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth.”

We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of **Section 19** of **Cap 15**. We are aware that **Section 2** of the **Children Act** defines a child of tender years to be one under the age of ten years. That definition is preceded by the words “*In this Act, unless the context otherwise requires...*”. That definition has not been applied to the **Oaths and Statutory Declaration Act, Cap 15**. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes.

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 verbatim as opined by the English Court of Appeal in **REGINA –VS- CAMPBELL** (Times) December 20, 1982, and **REPUBLIC –VS- LAL KHAN** [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed.

DK's evidence was in the circumstances improperly received. Without it, as the State rightly conceded, there is nothing left sufficient to found the appellant's conviction. We dare add that even as it stood, DK's evidence was so riddled with inconsistencies that its examination by the courts below ought to have left doubts resolvable to the benefit of the appellant. In all the circumstances of the case there never was evidence sufficient to show that DK was defiled by the appellant. She voluntarily left her home at 7.00 p.m. on a Friday evening ostensibly to go job-hunting at Kiirua Market. The evidence of the appellant and of his wife, (PW2) is that DK then came to their home, and asked DW2 for accommodation as she was late going to her home.

She ended up staying there for at least two days. When she finally was found by her frantic grandmother, the latter reported to the chief and the police. Tellingly, the report made against the appellant initially was one of abduction, not defilement. The contradictions may well have been cleared by calling the

shopkeeper and hotelier who should have seen DK with the appellant on the fateful night if DK's account was true. The prosecution chose not to call them and, with their evidence being scanty or merely adequate at best, the two courts below ought to have made the necessary inference that those witnesses' testimony would have been adverse to the prosecution case. **BUKENYA & OTHERS -VS- UGANDA** [1972] EA 549.

In sum, the appellant's conviction was unsafe and we quash it. We set aside the sentence and order that the appellant be set at liberty forthwith, unless otherwise lawfully held.

Dated and delivered at Meru this 9th day of July 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. 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