



**IN THE COURT OF APPEAL**

**AT MALINDI**

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

**Criminal Appeal No. 44 Of 2013**

**BETWEEN**

**M K.....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Mombasa (Muya, J.) dated 30<sup>th</sup> May, 2013*

*in*

*H.C.Cr.A. No. 136 of 2011)*

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**JUDGMENT OF THE COURT**

The appellant had been employed by **C Z N** (PW2) as a househelp. By 30<sup>th</sup> January, 2010, he had worked for her for about 3 years. As part of his employment benefits, the appellant had been assigned sleeping quarters within the homestead. PW2 had several children among them **B W N** (PW1), then aged 14 or 15 years. Overtime, the appellant enticed PW1 into a non-consensual sexual relationship which he escalated to the level that they had to elope to the appellant's home at [Particulars withheld] of the then Taita District of Coast Province. Apparently, the appellant and PW1 had for sometime been scheming for an opportune moment to elope. That opportunity presented itself on 30<sup>th</sup> January, 2010, when PW2 briefly left the homestead. PW1 packed her bags and with the appellant in tow they rode to the appellant's home arriving on the morning of 21<sup>st</sup> January, 2010. They found the appellant's father **J K M** (PW6) at home. The appellant introduced PW1 to him as his wife. PW6 then made arrangements to meet the relatives of PW1 among them **J L M** (PW5), the paternal uncle to seal the alleged marriage. They met at Maungu town and then proceeded to PW6's homestead. Upon arrival, PW1 insisted that she was now a wife to the appellant but PW2 and PW5 would hear none of her protestation as to them she was still a student at [Particulars withheld] Secondary School. The appellant retorted that he had decided to marry her and let her continue with her studies. He even reminded them that Giriama men marry women as low in age as 12 years or thereabouts. Because of the stance taken by the appellant, and PW1 the matter was then referred to Mgange Police Post. On 2<sup>nd</sup> February, 2010, **PC. Obote Okach** (PW3), who received the complaint summoned the appellant to the police post and upon arrival, arrested him. In the meantime, he caused PW1 to be examined by **Marian Mghoi Rashid** (PW4), a clinical officer based

at Wundanyi Health Centre. Her examination revealed that PW1's hymen was not intact, which was evidence of penetration, and therefore she had been defiled. On the evidence so far gathered, PW3 preferred against the appellant the charge of defilement of a girl contrary to **Section 8(3)** of the Sexual Offences Act. The particulars being that, on diverse dates between 11<sup>th</sup> November, 2009, and 30<sup>th</sup> January, 2010 at [Particulars withheld] Village, Mgange Location, Taita District within Coast province, the appellant had carnal knowledge of BWN. a girl aged 14 years. In the alternative, the appellant was charged with the offence of indecent assault on a female contrary to **Section 11(1)** of the Sexual Offences Act. Particulars being as in the main count save that the appellant was now accused of unlawfully and indecently assaulting the victim by touching her private parts, the vagina.

The appellant denied both counts and his trial commenced in earnest before the Resident Magistrate's Court at Wundanyi.

In his unsworn defence, the appellant admitted to PW2 having employed him. However, they had fallen out on account of her nonpayment of his dues resulting in him being forcefully sent away. On 30<sup>th</sup> January, 2010, he came calling on PW2 demanding his dues. PW2 agreed to pay him but only before police officers to avoid a situation where he could demand for the same payment later. Upon arrival at the police station, he was immediately arrested and locked up. On 3<sup>rd</sup> February, 2010, he was presented before court over charges he knew nothing about.

**Hon. F. Munyi**, the Resident Magistrate was satisfied that on the evidence presented the appellant had committed the main offence charged. Accordingly, he convicted and sentenced him to twenty (20) years imprisonment. His appeal before the High Court was dismissed, hence, this second and perhaps last appeal.

The appellant initiated this appeal in person by filing three (3) grounds ; that the charge sheet was fatally and incurably defective; that the age of the complainant being a material consideration in sexual assault offences was not proved, and finally; that his defence was not given due consideration.

The appellant argued the appeal through written submissions. In a nut shell, he submitted that the charge sheet was defective because it was pegged on the penalty section as opposed to **Section 8(1)** that creates the offence. With regard to the age, the appellant submitted that the age of the complainant being a paramount consideration as the sentence imposed upon conviction is dependant on such age, it must be proved beyond reasonable doubt. In the circumstances of this case, this was not done. The evidence of PW1, PW2 and PW4 was contradictory regarding this aspect he submitted, and the age of PW1 was variously put at between 14 and 15 years (respectively). The appellant went on to submit that had the High Court carefully evaluated this evidence as required, it would have come to the conclusion that the offence charged had not been proved. Finally, the appellant accused the two courts below of not considering his defence at all before reaching their various verdicts.

**Mr. Monda**, Assistant Director of Public Prosecutions, supported the appellant's conviction arguing that, the two courts below were right in coming to the conclusion that the appellant had committed the offence; that there was overwhelming evidence against the appellant; that the complainant had no capacity to consent, and that customary law could not take precedence over statute law. Asked by us whether from the record, he was satisfied that the High Court had performed satisfactorily its statutory duty of re-evaluating the evidence tendered before the trial court afresh and reaching its own conclusion, counsel half-heartedly answered in the affirmative. Otherwise, he was of the firm view that the conviction of the appellant was safe and ought not to be disturbed.

This being a second appeal, our jurisdiction under **Section 361(1) (a)** of the Criminal Procedure Code is limited to considering the appeal on matters of law only. Secondly, as was re-stated in **Boniface Kamande & 2 others vs R [2010] eKLR**, in considering the appeal , we are obliged to pay homage to the concurrent findings of the two lower courts and should only interfere if the findings of the two courts below were not based on no evidence or were not reasonable. We have considered this appeal taking cognizance of the above.

The grounds of appeal raised in this appeal were the very same grounds that the appellant advanced in the High Court. Unfortunately, the learned Judge did not address any of them in his judgment. Accordingly, we do not have the benefit of his decision on the grounds. The learned Judge merely rehashed the evidence as tendered in the trial court and concluded thus:

*“...There is overwhelming evidence that the Appellant had eloped with her with the intention of marrying. After perusing the record of proceedings, it’s clear that the Appellant understood the charges facing him and pleaded guilty to them twice but the trial Magistrate did not enter a plea of guilty at the time. The facts were read to him and he admitted them but denied the happenings of November, 2009. It is inconceivable how he could have eloped with her in January, 2010 when there was no relationship with her prior to the incident. I find that the conviction was safe. This unfortunately is a case of the clash between customary law and statutory law”*

It is trite that it is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there was no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there is some evidence to support the trial court’s findings and conclusions. See **Okeno v R [1972] E.A. 32**, **Ogeto v R [2004] 2 KLR 14** and **Simiyu & Another v R [2005] 1KLR 192**. Granted that there is no set formula as to how such evidence is re-evaluated and or analysed, however such an undertaking must be self-evident. This was not the case here. It is quite discernable from the record that the High Court failed to properly or at all re-evaluate the evidence and draw its own conclusions in deciding whether the judgment of the trial court should be upheld or not as required. The High Court merely summarized the evidence tendered in the trial court, findings of the trial court and concurred with the said findings without subjecting the evidence to fresh and exhaustive scrutiny. Failure to undertake such an exercise on a second appeal becomes a matter of law. Accordingly, the appellant is right in calling for this court’s intervention in that respect. We are not at all convinced that the failure did not occasion the appellant prejudice.

PW1 was subjected to *voir dire* examination by the trial court though it was claimed in evidence that her age was 15 years. Was *voir dire* examination in the circumstances of this case therefore necessary? We do not think so. *voir dire* is conducted where a witness is a child of tender years. There is no definition in the Oaths and Statutory Declarations Act of the expression “*child of tender years*”. However, this Court in **Kibangeny Arap Kolil v R [1959] E.A. 92** took it to mean “*in the absence of special circumstances, any child of an age or apparent age of under fourteen years.*” But in the case of **Mohamed v Republic (2005) 1KLR 1175**, This Court said:

*“ ... whether a child is of tender years however still remains a matter of the good sense of the Court.”*

However, we believe the statutory age requirement as per the Children’s Act is the way to go. See also **Ayieyo v Republic (2008) 1KLR 684**. Under the Children’s Act, a child of “*tender years*” has been defined as “*that of below the age of ten years*”. In this case, the complainant was aged either 14 or 15 years and was a student at [Particulars withheld] Secondary School. There were no special circumstances disclosed in the record that led the court to conduct *voir dire* examination with regard to her intended evidence. Following the unnecessary *voir dire* examination, the court ruled that since she understood the meaning of telling the truth, she would give unsworn evidence. Indeed, she proceeded to testify as such, with the appellant not being afforded an opportunity to cross examine her. Can it be said then, that given the circumstances, the appellant was not thereby prejudiced in his defence? In any event the *voir dire* examination itself was flippantly conducted and did not elicit the appropriate answers. Had the High Court been faithful to its mandate as a first appellate court, it should have been able to say that the *voir dire* examination was unnecessary and determine that as a result the appellant was thereby prejudiced in his defence having been denied the right to cross-examine PW1.

Finally, we must observe that the judgment of the High Court is scanty and does not exhibit the seriousness with which the High Court was expected to approach the appeal. This was an appeal in which the appellant had been condemned to twenty (20) years imprisonment. It required serious approach and

consideration. We are however not saying that there are other appeals that do not require serious consideration. The judgment does not exhibit the above. Rather, it is ambivalent and mere four pages with unnecessary big font. The first page is dedicated to outlining the charges and their particulars. The 2<sup>nd</sup>, 3<sup>rd</sup> and ½ of the 4<sup>th</sup> page is a re-hash of the grounds of appeal and the summary of the evidence rendered in the trial court. The decision on the appeal is incapsulated in the last paragraph of page 4. Clearly, the High Court did not comply with **Section 169** of the Criminal Procedures Code, which prescribes the contents of a judgment. It never identified issues for determination which as we have already observed were in the grounds of appeal filed by the appellant. The High Court as already stated did not re-evaluate and analyse the evidence so as to draw its own conclusions and pronounce itself on those issues giving reasons for the determination. We cannot say that by that failure, the appellant was not again prejudiced. We deprecate casual approach exhibited by the High Court in handling the appeal.

We think we have said enough to show that this appeal must be allowed. Accordingly, the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

*Dated and delivered at Malindi this 3<sup>rd</sup> day of July, 2015.*

**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**