



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), MARAGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 84 OF 2013

BETWEEN

J G G 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. 565 of 2009)

JUDGMENT OF THE COURT

(1) This is a second appeal by J G G, hereinafter referred to as that appellant, who was convicted of the offence of defilement of a girl under the age of 15 years contrary to **section 8 (1)** as read with **section 8 (3)** of the Sexual Offences Act. The brief particulars of that charge were that on the night of the 2nd October, 2009, at **[particulars withheld]** Village in Kiambu District within Central Province, the appellant intentionally committed an act which caused penetration with his genital organ into the genital organ of JMG.

(2) By way of background information, we wish to set out the evidence led before the trial court. JMG, who we shall hereinafter refer to as the complainant, was at the time material to this appeal aged thirteen (13) years. She was living in **[particulars withheld]** with her mother and brother. On the 28th September, 2009 the complainant and her cousin, S M, had gone to the salon. At around 8.00 pm they returned home to find that the complainant’s mother had locked their house. The complainant decided to escort Serah home. When they got to Serah’s house, her parents chased them away, so they went to their grandmother’s house where they slept on the verandah. The following day, Serah went back home, and the complainant went to the house of P M K (PW 2), where she stayed for four days.

(3) On the fifth day, D N W (PW 3) and J G G, the appellant, who is the complainant’s cousin, came to Priscillah’s house. The appellant told Priscillah that he had been sent to pick the

complainant by her mother. Priscillah told the complainant to go with the two so that she could be taken home. They left Priscillah's house and Ngethe went away, leaving the complainant with the appellant. The appellant told her that he wanted to pass by his house to pick up his phone. When they got to his house, the appellant persuaded the complainant to enter the house by telling her to wait for him to cook, and he would then escort her home. However, the appellant began watching television. The complainant became sleepy, and the appellant told her to go and sleep. The appellant went and joined her on the bed and started touching her, and then he raped her and injured her on her private parts in the course of doing so. The next morning, the appellant locked the complainant in the house and went to work.

(4) Meanwhile, on the 1st October, 2009, the complainant's mother had alerted her sister, S M, that the complainant was missing. They investigated, and found out that the appellant had been at Priscillah's home. Salome and the complainant's mother went and made a report at Karuri Police Station. Together with the police, they went to the appellant's house, where they found the complainant asleep in his bed, and the appellant in the house with a towel around his waist.

(5) The complainant received treatment from Dr. Ketra Muhombe of the Nairobi Women's Hospital. The doctor examined the complainant on the 4th October, 2009. The doctor testified that during her examination, the complainant had her menstrual period, so she was unable to tell if the complainant had been sexually assaulted or injured in any way.

(6) When put on his defence, the appellant denied committing the offence. He stated that the complainant's mother had instigated the charges against him because he had damaged her house with a donkey cart and had not repaired it and also because he owed her a sum of Kshs.1,500.00 on account of a television that he had bought from her.

(7) In its analysis, the trial court found that there was sufficient evidence that the appellant had sexually assaulted the complainant after luring her to his house on the pretext that he would be taking her home. The court therefore formed the opinion that the prosecution had proved the guilt of the appellant beyond a reasonable doubt and convicted the appellant of defilement of a child under **section 8 (3)** of the Sexual Offences Act and sentenced him to imprisonment for a term of twenty years.

(8) The appellant was aggrieved, and lodged a first appeal in the High Court. In that appeal, he alleged that the charge sheet was defective for two reasons. The first was that he ought to have been charged under **section 20** and not **section 8 (3)** of the Sexual Offences Act, because the complainant was his cousin, and second, that the charge as framed was defective for failure to include the word 'unlawfully'. The appellant also contended that the evidence led before the trial court did not prove the charge to the required standard as it was contradictory and incredible. The appellant also took issue with the fact that the complainant's mother did not testify at the trial, and claimed that she was the only one who could have provided evidence to prove the offence of defilement of the complainant.

(9) That appeal was dismissed by Achode, J. In her assessment, the first appellate court formed the opinion that the charge as framed was not defective in any way; and that all that needed be proved by the evidence was that the appellant had committed an act which caused penetration with a child. The learned Judge found the evidence led by the prosecution was credible and was enough to satisfy her of the appellant's guilt. The first appellate court further found that the trial court could not be faulted in its assessment of the evidence, and was of the view that the appellant's defence did not dislodge the overwhelming prosecution evidence. The conviction and sentence meted out on the appellant was therefore affirmed.

(10) The appellant being still aggrieved preferred the present appeal. During the hearing before us, the appellant appeared in person. Mr. Orinda, learned counsel for the State opposed the appeal.

(11) The appellant relied on his amended memorandum of appeal which cited the following grounds of appeal: that the charge sheet was incurably defective; that there was no *voire dire* examination of the complainant; and that the appellant had a valid defence which was rejected without any credible reason. Mr. Orinda, in opposition, stated that there was sufficient evidence to warrant the finding that the appellant was the one who defiled the complainant, and therefore the courts below were correct in finding that the appellant was guilty.

(12) In hearing and determining an appeal such as the one before us now, we are enjoined by **section 361** of the Criminal Procedure Code to consider only matters of law. See ***Karingo v Republic [1982] KLR 219***, where this Court rendered itself in the following manner:

“A second 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.”

(13) One issue of law raised by the appellant was that the first appellate court failed to appreciate that there was no *voire dire* examination conducted on the complainant. Mr. Orinda did not consider this to be a valid ground, and countered that there is evidence that the complainant understood that she was required to tell the truth.

(14) At page 2 of the record of appeal, it shows that the trial magistrate made the following statement: ***“(court satisfied that she understands the importance of speaking the truth),”*** after which the trial magistrate recorded that the complainant was duly affirmed and then proceeded to record her evidence. It appears that the examination that led to that assessment by the trial court was not recorded. The appellant in his submissions states that this was a fundamental error on the part of the trial magistrate, and therefore urges us to find that the proceedings conducted subsequent to the reception of the complainant’s evidence were defective.

(15) **Section 19** of the Oaths and Statutory Declarations Act provides that:

“19. (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”

(16) This section was judicially considered in the case of ***Mohamed v Republic [2005] 2 KLR 138*** where this Court stated as follows:

“Section 19 (1) ... requires of the Court to establish two matters: firstly, whether the child understands the nature of an oath. If the Court comes to that conclusion, then it proceeds straight away to swear or affirm the child and to record the evidence. Secondly, if the court is not satisfied on the first test, it should express its opinion, not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child’s evidence.”

(17) Does **section 19** of the Act quoted above, require that the questions asked in the

examination be noted down? In *Johnson Muiruri v Republic* (1983) eKLR (Criminal Appeal No. 44 of 1982) this Court considered the import of that section as well as whether it was desirable for a trial court to record the questions asked in *voire dire*. The Court rendered itself as follows:

“2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

...

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 (sic) the court took is clearly understood.

...

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

...

9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth.”

(18) In *Yusuf Sabwani Opicho v Republic* [2009] eKLR (Criminal Appeal No. 208 of 2008) this Court was confronted with an appeal, where the trial magistrate did not, as was the case here, record the *voire dire* examination carried out on the four year old child witness. The trial magistrate had simply noted that the witness spoke well, and was intelligent. The Court, quoting with approval the earlier holding of the Court in *Joseph Muiruri v Republic* (*supra*), considered that the failure of the trial magistrate to comply with the procedure set out in **section 19** of the Act was a flagrant breach of the law and procedure, and therefore vitiated the evidence of that witness.

(19) We, however, believe the correct approach to take is that which was set out by this Court in the case of *Mohamed v Republic* (*supra*) where the Court stated that:

“The recording of a voire dire (under section 19 of the Oaths and Statutory Declarations Act) in the form of questions and answers may be an appropriate procedure where the procedure for recording proceedings is an elaborate one with shorthand personnel and electronic recording as it is in England. The requirement for recording proceedings in Kenya is however, regrettably, still in long-hand and it is not mandatory to record both the questions and answers from witnesses, unless in the circumstances of any particular case, there is need for emphasis.” (Emphasis ours)

(20) Therefore, we do not consider that a trial court’s failure to record the questions and answers asked would, of itself, vitiate the evidentiary value of the testimony of a child of tender years. What matters is that the trial court undertakes an examination of the child to ensure that the child understands the nature of an oath. If the child understands, then the court can receive the sworn evidence of the child. If the child does not understand the nature of an oath, then the court should satisfy itself that the child is intelligent enough to justify the reception of his evidence, and that the child understands the duty to tell the truth, after which the court can then take the unsworn

evidence of the child.

(21) We must now consider whether this was done in the trial that led up to this appeal. The complainant in this case was a girl of thirteen years, who at the time of giving evidence was attending school and was in standard seven. Was she a child of tender years as envisaged by **section 19** of the Act? We are aware of the previous decisions of this Court holding that whether a child is of tender years is a determination to be left to the good sense of the Court (see ***Mohamed v Republic (supra)***).

(22) On our part, we do not think that even if there was a failure to conduct *voire dire*, it would have mattered in the circumstances of this case. **Section 2** of the Children Act, 2001 defines a child of tender years as one who is under the age of ten years. The issue of non-compliance of the Oaths and Statutory Declarations Act therefore would not arise, as **section 19** thereof concerns children of tender years. The complainant in the present appeal was aged thirteen, and therefore was not a child of tender years. Nothing therefore comes of this ground of appeal, and it consequently fails.

(23) We now turn to the second issue raised by the appellant, which is that the first appellate court failed to consider that there was a grudge between the appellant and the complainant's family, and also that the trial court failed to consider his defence, thus rendering the judgment of the trial court a nullity under **section 169** of the Criminal Procedure Code. We have read the judgment of the trial court, and find that it cannot be faulted. The trial court properly set out the issues for determination, and proceeded to make a finding in respect of each issue. The appellant's defence was considered and the trial court found that the evidence led by the prosecution witnesses was truthful and credible. Nothing therefore comes of this ground.

(24) The third issue of law raised by the appellant is that the charge was incurably defective, as the evidence that was adduced in court varied materially with the charge. Related to this, the appellant submitted that the age of the complainant was not conclusively proved as her mother was never called to give evidence, and there was no documentary evidence that showed her date of birth. In response, Mr. Orinda submitted that there was sufficient evidence that led to the conclusion that the appellant had defiled the complainant.

(25) To prove the charge of defilement of a child contrary to **section 8 (3)** of the Sexual Offences Act, the evidence adduced must show that the accused committed an act that caused penetration with a child between twelve and fifteen years. The evidence of defilement was led by the complainant only, who at the time was aged thirteen years old. **Section 124** of the Evidence Act allows a court hearing a criminal case that involves a sexual offence to rely on the uncorroborated evidence of a minor child if it believes that evidence. The evidence that was adduced during trial was clear and cogent, and was to the effect the complainant was aged thirteen, and that the appellant went to Priscillah's house where the complainant was staying, and under the guise of taking her home, he left with her. The appellant then took the complainant to his house where he proceeded to defile her.

(26) Dr. Muhombe's testimony was that she was unable to tell whether the complainant had been sexually assaulted because she was menstruating. This did not in any way water down the evidence tendered by the complainant. In the words of this Court in ***Kassim Ali v Republic [2006] eKLR (Criminal Appeal No. 84 of 2005)***:

“The commission of a sexual offence can be properly corroborated by circumstantial evidence... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.” (Emphasis ours)

(27) In addition to the evidence of the complainant, there was strong circumstantial evidence linking the appellant to the offence. When the police arrived at the appellant's house, he was

found in a state of undress, wrapped in a towel, while the complainant was found sleeping in his bed. This evidence, when taken together with the complainant's evidence, points irresistibly to the appellant's guilt, and his submission that he was charged on the basis of mere suspicion cannot stand.

(28) In the result, we find that there is not a single reason to warrant our interference with the concurrent findings of the two courts below. This appeal lacks merit and we order it dismissed.

Dated and delivered at Nairobi this 10th day of October, 2014.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR