IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OMOLO, NYAMU & NAMBUYE, JJ.A.)

CRIMINAL APPEAL NO.486 OF 2010

BETWEEN

ROBERT KABWERE KITI…………..............………...APPELLANT

AND

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

(Appeal from the High Court of Kenya at Mombasa (Hon. Lady Justice Odero J.) dated 15th September, 2010

in

H.C.CR.C. No.4016 of 2007)

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JUDGMENT OF THE COURT

The appellant ***ROBERT KABWERE KITI***was charged in the Chief Magistrate's Court at Mombasa with an offence of defilement of a girl contrary to ***Section 8(2) of the Sexual Offences Act No.3 of 2006,*** in that between 10th and 11th December, 2007 at unknown time in Mombasa District within the Coast Province, he committed an act which caused penetration with a child namely ***H. K***, a girl aged 8 years.

He also faced an alternative charge of indecent act contrary to Section 11(1) of the same Act,in that between 10th and 11th December, 2007 at unknown time in Mombasa District within Coast province committed an indecent act to ***H. K*** a girl aged 8 years by touching her private parts namely vagina.

The prosecution case was that PW1 ***H.K*** a minor was asleep on the bed with her younger brother **I** on two occasions, on 10th and 11th December, 2007 when the appellant came into the bed, covered her mouth with his hands, removed her clothes, removed his penis and inserted it into her vagina and defiled her twice. The Appellant had earlier been brought to the house where this incident took place by her father PW3 ***Z.G alias S*** and had stayed there for four days. The first incident was reported to the father but he took no action. On 11th, PW2 ***J. W*** and teacher of **H** noticed the minor walking with difficulty and upon examination J noticed injuries on the minor's private parts and upon inquiry from the minor about their causation said they had been caused by ***Dunga.*** **J** reported to the Village Elder who sent for the minor's father, who came with the appellant and in the presence of J, the minor pointed out the appellant as the person who had caused her the injuries on her private parts. The father confirmed in the presence of **J**,

that he had given accommodation to appellant at his house for 4 days and used to leave him (appellant) in the house with the children in the absence of the children's mother who had left. The matter was reported to Nyali Police Station where ***No.66247 PC MwanatumuGuyato (PW4)*** received the report, appellant and the complainant. Both the complaints and the appeals were escorted to Dr**, Lawrence Ngoni (PW5)** a medical Officer at Coast General Hospital. The Doctor found the minor's membrane ruptured, swollen genitalia, foul smell which was evidence that she had bled and concluded that there had been penetration caused by a blunt object. The appellant gave unsworn evidence that he stays at Barsheba. Before the 10th and 11th December, 2007 he was at K. He was arrested at about 4.30 p.m. on 11th from home and taken to Nyali Police Station and later brought to court.

In a judgment dated 17th day of April, 2008, after a full trial the trial court convicted the appellant and after considering the nature of the offence and the age of the minor, the learned trial magistrate remitted the file to another subordinate court of higher jurisdiction forthe sentence where upon a sentence of life imprisonment was handed out the appellant.

The appellant was aggrieved with that judgment and appealed to the High Court where that appeal was heard by M. OderoJ who dismissed the appeal asagainst both the conviction and sentence.

The appellant has now came to this Court by way of a second appeal citing seven (7) grounds of appeal in a homemade memorandum of appeal. At the hearing of the appeal, the appellant who was unrepresented, made a brief address to the Court to the effect that he did not agree with the conviction and that the sentence should be reduced. The state on the other hand, through Mr. **Jacob Ondari Assistant Director of Public Prosecution, has** urged this Court to confirm the decision of the subordinate court as confirmed by the Superior court both on conviction and sentence because the conviction was based on sound evidence, and that the sentence is lawful as it is the only one provided for in law.

This being a second appeal this Court can only deal with issues of law. The first complaint raised by the appellant relates to admissibility of evidence of a minor in criminal proceedings namely that the learned judge of the High Court erred in law by admitting the evidence adduced by a minor without considering that the same was not supported by any other material evidence as required under section 124 of the Evidence Act, but the State through Jacob Ondari Assistant Director of Public prosecution has argued that the correct procedure was followed before the admission of the minor's evidence. The learned ADPP contended that the evidence of the child was uncontroverted and that its admissibility was preceded by the required procedure for admission being followed. In the case of ***Kibageny vs Republic [1959] EA 92*** the predecessor of this Court drawing inspiration from the decision in the case of ***Reginam vs Campbell [1956] 2 ALL E.R. 272*** ruled that Section 19(1) of the Oaths and Statutory Declarations Act does not define the expression "***child of tender years***" but the court took it to mean, in the absence of special circumstances,***"any child of an age or any apparent age of under 14 years"***.

We are alive to the current provision of Section 2 of the Children Act No.8 of 2001 which defines "***a child of tender years***" to mean any child below the age of 10 years but with a caveat that this definition is for the purposes of that Act meaning that for proceedings other than those initiated under the said Act, determination of who a child of tender years still depends on the ***"good sense***" of the particular judge save that the said ***"good sense"*** has now been enlightened by this clear provision and there should be no serious departure on parameters set by that section.

The procedure employed in determining a child of tender years understanding of the nature of the proceedings and the obligation to speak the truth is what has come to be known in law as "***voire dire examination***." It is evident that the steps to be taken in the said examination are not inbuilt in ***Section 19 of the Oaths and Statutory Declaration Act (Supra)***. These have however been crystallized by case law. In the case of ***Johnson Muiruri versus Republic [1983] KLR 445***, this Court stressed the need forsetting out the questions put by the court to the minor and the responses given to those questions by the minor. The position in the ***Muiruri case (Supra)***has however been qualified by a later decision of the Court in the case of ***Mohammed versus Republic [2005] 2KLR 138*** where the Court ruled that it is not mandatory to record both questions and answers from the witness unless in the circumstances of any particular case there is need for the setting out of the particular questions and answers.

The record of the magistrate shows that the voire dire examination of “**H**” before reception of her evidence was undertaken by the learned trial magistrate pursuant to which the court was satisfied that the minor understood the nature of the proceedings and could testify, and although there is no express indication on the record that the minor also understood the obligation to speak the truth and could therefore give sworn evidence, a reading of the narrative of the minor’s responses on the record confirms that the minor understood the obligation to speak the truth. We have no doubt that is why the minor gave sworn evidence. The learned Judge of the High Courtrevisited that issue in her judgment and was satisfied that the subject minor was “***bright and intelligent***” and understood the nature of the proceedings and obligation to speak the truth and that the learned trial magistrate correctlyallowed the minor to give sworn evidence. The evidence was therefore properly received by the lower court, and there is no legal basis upon which the court can interfere.

Turning to corroboration as a requirement for the minor’s evidence as complained by the appellant, in the ***Mohamed versus Republic case (Supra)*** this Court made the following observations:-

“By legal notice NO.5 of 2005 which introduced the provisoto Section 124 of the Evidence Act, Parliament drastically qualified Section 124 of the Evidence Act to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be humstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful.”

In line with the aforesaid reasoning in the two cited cases above, we find that no corroboration was required for the testimony of “**H”“K**”, the complaint herein. We note that the trial magistrate was satisfied she was a truthful witness but all the same sought other supporting evidence and found it in the evidence of PW2 who noticed the child walking with difficulty and upon interrogation of the child and being told of what the child had undergone and going further to examine the child, observed injuries on the child’s private parts. PW2’s observations were confirmed by medical evidence adduced through PW5 and the production of the P3. On this challenge we observe that the two courts below having made concurrent findings of fact, no legal basis was established for our intervention at all.

With regard to the alleged defects in the charge sheet the learned trial Magistrate found no defects in the charge itself. If the defect in the charge is attributable to the discrepancy in the age of the victim as stated in the charge sheet 8 years and PW1’s evidence of 7 years, and the P3 from reading 8 years, the said discrepancies are in our view minor and are curable under Section 382 of the Criminal Procedure Code. They have not caused any miscarriage of justice because whether 7 years or 8 years, “**H’s”** age fell in the age bracket for the offence of defilement of a girl below the age of 11 years and the penalty has been clearly allocated in terms of the complainant’s age.

With regard to complaint of violation of constitutional rights by the police holding the appellant beyond the 24 hours prescribed by the retired Constitution before arraigning him in court, we note this complaint was not raised before the trial court, but was raised for the first time in the appeal to the High Court which at the time, the proper court to consider such matters. The learned Judge of the High Court found as a fact that indeed the appellant had been taken to court 6 days after arrest but went ahead to reject the appellant’s assertion that the delay was inordinate and that it was sufficient to entitle him to an order of nullity of trial and that it negated the concept of a fair trial. We note that in reaching this conclusion, the High Court took into account the emerging jurisprudence of this court as reflected in the case of “***Julius Kamau Mbugua versus Republic Criminal Appeal No.5 of 2008***” in which the court drew inspiration from decisions on the subject from comparable countries in the commonwealth and stated inter alia that violation of rights which had no linkage to the offence charged could be redressed separately and should not result in automatic acquittal. The facts of this case bringsthis matter in this category on our part, we reiterate the holding that holdings in that case and therefore hold that nothing turns on this challenge.

With regard to allege failure to call crucial unnamed witnesses, the record indicates that only Mama Kinya Mazi did not come to testify. We are satisfied with the finding of the learned Judge of the High Courtthat failure to call this witness was not fatal because firstly, there is no fixed number of witnesses

required to be called to establish the existence of a fact. Secondly the prosecution is not obligated to call each and every witness who comes forward and offers to testify. Any number is sufficient to establish the fact under inquiry. Thirdly the targeted witness would, in our view simply have given evidence similar to that of PW2. Fourthly the prosecution can only be faulted for non presentation of this witness if it can be demonstrated that the failure to so present the said witness falls into the principle set by the predecessor of this court in the case of ***Oloro and Daltanyi versus Reginam [1956] 23 EACA 49*** where it was held inter alia that: -

"Prosecution have a duty to call material witnesses. If they fail, the presumption is that if the evidence had been called that evidence would have been unfavourable to the prosecution."

By reason of being a person who received a report of an alleged commission of an offence, failure to testify that the report was received, does not prejudice the appellant in any way but the other witnesses who filled the gap. The learned Judge of the High Court rightly dismissed that assertion and we affirm that dismissal.

Complaint of failure to call for age assessment of the prosecution witnesses and non production of the P3 form, do not hold because only one prosecution witness namely PW1 needed age assessment.There is clear demonstration in the record that Pw5 the medical doctor produced both the P3 in respect of the complainant minor showing an assessed age of the minor as being of 8 years old. The same P3 for the minor as well as that of the appellant were produced as exhibits. In our view the assessment of the minor's age byPw5 did suffice. We have said enough to show that this appeal is destined to fail in its entirety.

The appeal against both conviction and sentence is hereby dismissed.

Datedand delivered at Mombasa this 15th day of March, 2012

R.S.C. OMOLO

JUDGE OF APPEAL

J.G. NYAMU

JUDGE OF APPEAL

R.N. NAMBUYE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR