REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 3 OF 2020

PETER MUTUA KIMWELI....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence by Hon D. Orimba (SPM) in the Senior Principal Magistrate's Court at Kangundo delivered on 21.5. 2019**)**

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

PETER MUTUA KIMWELI.....ACCUSED

JUDGEMENT

1. The appellant herein, **PETER MUTUA KIMWELI**, was charged with two counts. Count I was in respect of the offence of defilement contrary to section 8(1) as read with section 8(3) and 19(1)(a) of the Sexual Offences Act. The alternative charge was for the offence of committing indecent act with a child contrary to section 11(1) of the said Act. The second count was in respect of the offence of defilement contrary to section 8(1) as read with section 8(4) and 19(1)(a) of the Sexual Offences Act.

2. He was acquitted on the main charge and convicted on the alternative charge of both counts and sentenced to serve ten (10) years' imprisonment on each alternative count which sentences were to run concurrently.

3. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal as amended with grounds summarized as follows: -

a. The learned magistrate erred in law and fact in convicting the appellant on evidence that was full of contradictions, inconsistencies and fabrications hence should not have been relied upon as a basis of the appellant's conviction.

b. The trial magistrate erred in law and fact in disregarding the fact that the prosecution did not prove the particulars of the alternative charge beyond reasonable doubt.

c. The trial magistrate erred in law and in fact in failing conduct a voir dire examination that was fatal to the prosecution case.

4. The appellant's written submissions dated 6.11.2020 were filed on 10.11.2020 while the Respondent's Submissions are dated 15.10.2020.

5. The appellant submitted on each of the grounds raised in the appeal. On the issue of inconsistencies, it was submitted that Pw3 contradicted herself when on one hand she said she told the matron about the incident and on the other hand she said she did not tell the matron. In placing reliance on the case of **Pandya v R (1957) EA 336** it was submitted that the evidence of the prosecution witnesses was untruthful. On the issue of elements of the prosecution case, it was submitted that the age of the victim, PW2 was not proven. On the issue of failure to conduct a voir dire, the appellant took issue with the call by the state for an order for retrial and submitted that a retrial would occasion injustice. The court was urged to allow the appeal, quash the conviction, set aside the sentence and that the appellant be set at liberty.

6. In reply, counsel for the prosecution conceded to the appeal. It was submitted that the failure to conduct a voir dire was fatal and in placing reliance on the case of **Boniface Wambua Kiilu v R (2020) eKLR** the court was urged to order a retrial.

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

8. In support of the prosecution case, there were 7 witnesses lined up. Pw1 was **LMM**, a 12 year old student. In the absence of a voir dire she testified and gave sworn evidence that she knew the appellant as a watchman at the school she attends and that at night on the material day she was with her friend MM when the appellant told her to lie down, he removed his trousers and defiled her. She testified that he repeated the same thing on her friend MM and that this was not the first instance; that the appellant would always do the act at night. She testified that Mrs Musau found her with her pants on the grass. On cross examination she reiterated that the appellant defiled her and M.

9. Pw2 was **MMM**, an 18 year old pupil who testified that she knew the appellant as a watchman at her school. She testified that on a night in February, 2017, the appellant called her through a certain N, gave her mandazi then told her to lie on the grass. She recounted how the appellant told her to remove her pants and he removed his pants then laid on her. She told the court that she was with Pw1 and that she was taken to the hospital and examined. She testified that the matron got the information of the incident from N (Pw3).

10. Pw3 was NW, a 12 year old pupil who testified in the absence of a voir dire that on 10.2.2017, she was at school and she knew the appellant as a watchman at the school. She testified that the appellant called Pw1, Pw2 as well as herself and they started cracking jokes together. She told the court how the appellant handed over mandazi to her that she partook of and she went to the dormitory. She recounted how on the way to the dining hall to pick her book she found the appellant having sex with Pw2. It was her testimony that she later on two other occasions found the appellant and Pw2 having sex and that after the 3rd occasion she informed the head teacher who sent her to Mrs Musau who in turn she confronted Pw2. On cross examination she testified that she indeed saw the appellant on top of Pw2.

11. Pw4, MKM, a matron at the subject school testified that on 21.2.2017 at 7 pm she noticed that there were three persons namely Pw1 and Pw2 lying on the ground with the appellant. She testified that Pw1 and Pw2 informed her that the appellant called them and that the following day, there was a meeting with the head teacher where Pw1 and Pw2 revealed that the appellant had given Pw2 mandazi and had sex with her. It was her testimony that the girls were accompanied to the hospital where it was confirmed that one of the girls had been sexually assaulted. It was her testimony that Pw1 and Pw2 are special children; that Pw1 had mental issues

while Pw2 was a slow learner.

12. Pw5, RMN, a teacher at [particulars withheld] primary school testified that he knew the appellant as a watchman. He recalled how on 21.2.2017 he got information that the appellant was sexually assaulting Pw1 and Pw2. He told the court that a meeting was convened and Pw1 and Pw2 explained the molestation occasioned on them and that it was usually done in the evening. It was reported to him that the appellant used to call them in the field, lure them with victuals and sexually assault them. He tendered in court a confession by the appellant admitting to the act as minuted in minutes that were marked Exh1. On cross examination, he testified that he did not witness the incident.

13. Pw6, Dominic Mbindyo testified of a medical examination that was conducted on Pw1 and Pw2. The examination observed that Pw1 had a torn hymen that was not fresh, her external genitalia was normal and that she was on her period. He testified that there was no evidence of penetration as per the P3 form that he signed on 27.3.2017. He testified that the examination conducted on Pw2 indicated that she had normal genitalia, no vaginal bleeding and he signed the P3 form on 21.3.2017.

14. Pw7 was **Cpl (W) Susan Kwach**. She testified that she received a report of defilement occasioned by a watchman at the subject school. She testified that she booked the report, took statements that were to the effect that Pw3 had seen the appellant having sex with Pw2 and that she also saw the appellant touching the breasts of Pw1.

15. The trial court found that the appellant had a case to answer and he was put on his defence. He opted to give sworn evidence and did not call a witness. He testified that on the date of the offence he was at the school and he found Pw1 and Pw2 outside and that he told them to get inside. He testified that the matron found him and demanded to know what he was doing with the pupils; that the following day he had a meeting with the principal where it was alleged that he had been found defiling pupils. He testified that he was forced to sign a paper and that the pupils were taken to hospital. On cross examination, he testified that he did not buy mandazi and that Pw1 and Pw2 had mental challenges hence they had been coached to come and lie. He denied commission of the offence.

16. I have considered the appellant's grounds of appeal as well as the submissions and find the following issues for determination: -

a. Whether or not the prosecution had proved its case beyond reasonable doubt.

b. Whether there were procedural infractions that would vitiate the trial.

c. Whether there were contradictions in the evidence of the prosecution and whether the same could be cured by section 382 of the Criminal Procedure Code Act.

d. What orders may the court make"

17. On the issue of proof of the prosecution case, I shall combine the same with the aspect of contradictions. The Appellant submitted that the prosecution case was riddled with contradictions that cast doubt in the prosecution case and ought to be resolved in favour of the appellant. A perusal of the list of exhibits in the trial court showed a health card in the names of MM as evidence of date of birth as 16.4.1999. I see no contradiction in the same. In respect of Pw1, I see no evidence of her age.

18. With regard to evidence of penetration, the court considered the medical evidence was based on a P3 form and found that there was no penetration proven. As was held in **Richard Munene v Republic [2018] eKLR** not every inconsistency or contradiction is material. As for the identity of the appellant; the evidence was more of recognition and he himself admitted that he used to work at what was said to be the scene of the crime. In addition, there was an eye witness account of the incident that consisted in the evidence of Pw3 who found the appellant in flagrant delicto; there is the evidence of Pw2 who was a victim and I find that the prosecution evidence is cogent and consistently corroborated so as to prove that the unlawful contact between the genitals of Pw2 and those of the appellant took place. I am satisfied that Pw2 was truthful and so was Pw3. On the other hand, I am not convinced that the appellant was candid in his account of events and which did not dislodge that given by the victims and Pw3. In the case of **Mshila Manga v R (2016) eKLR** the court observed that under the proviso to section 124 of the Evidence Act for a conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof.

19. In the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** the East Africa Court of Appeal cited the case of ***Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly MR, Rigby and Collins L.JJ observed*** that "when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; **and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen**.

20. When I look at the evidence in totality, I am satisfied that there was no penetration and thus the trial court rightly considered the alternative charge as there was no evidence on penetration.

21. In light of the foregoing analysis, I am satisfied that the prosecution evidence proved their case beyond reasonable doubt regarding the alternative counts; that the appellant's version of events is not credible and I support the finding of the trial court and dismiss the appeal against conviction.

22. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, I find that the evidence on record is satisfactory to convince this court that the appellant is the perpetrator of the offences he was charged with.

23. I note that from the record, Pw2 was stated to be a slow learned while Pw1 was stated to have mental issues. The import of section 125 of the Evidence Act is that no person is precluded from giving evidence, except to the extent the court may determine. *Section 125 provides that:-*

"125. (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."

24. I am of the view that the court ought to have satisfied itself on the competence of Pw1 to testify considering that it was pointed out by Pw4 that Pw1 may have had a mental health challenges.

25. On the issue of procedural infractions and their effect, the appellant pointed out and I note that there was no voir dire conducted on Pw1. In the case of **Samuel Muriithi Mwangi v Republic [2006] eKLR,** the Learned justices of Appeal stated that;

"Section 19 of the Act provides for reception of evidence by children of tender years…."

26. It is trite law that when a court is faced with a child which is stated to be 14 years and below, according to case law (**Kibageny Arap Korir v R [1959] EA 92-93**, the court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it implicating the accused ***(Section 19 of the Oaths and Statutory Declarations Act).***

But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her.

27. Section 19 of the Oaths and Statutory Declarations Act provides: **"19. Evidence of children of tender years -**

(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 (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

28. Section 233 of the Criminal Procedure Code has been repealed, however the import of section 19 above is to ensure that the courts takes evidence of the child of tender age only upon satisfaction that the child is intelligent enough to testify on the matter before court and understands the duty of speaking the truth. In view of the statutory responsibility to assess the intelligence of the child and establish whether she/he understands the duty of speaking the truth, the trial court conducts a voir dire before taking the evidence of any child of tender age.

29. Having gone through the law and legal principles above, the record does not reveal that questions were put to Pw1 and answers recorded and it cannot be said that a voir dire was conducted. The basis of the learned Magistrates opinion to swear in Pw1 is not known since he did not record any questions or answers to any question. There is no evidence of dialogue completely.

30. In respect of Pw1, even though there was infraction in taking her evidence as there was no voir dire conducted, I am convinced that there is evidence against the appellant. I would then have to consider whether or not to order a retrial.

31. As was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

23. The Court of Appeal in the case of **Mwangi v Republic [1983] KLR 522 held** as follows;

"…several factors have therefore to be considered. These include:

1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.

2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.

3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.

4. A retrial should be ordered where the interest of justice so demand.

Each case should be decided on its own merits."

24. I am satisfied that the prosecution evidence against the appellant would sustain a conviction. However, because of the infraction on the taking of evidence of children of tender years without conducting a voir dire, I find that a retrial is merited in the circumstances. Even though the appellant has opposed a retrial, I find that he does not stand to suffer any prejudice as the impugned trial was concluded not too long ago and that he has not been in prison for that long. The availability of witnesses shall not be complicated because the complainant and the prosecution witnesses can be availed by the prosecution. Again, it is noted that the appellant has barely served his sentence and hence he does not stand to be prejudiced in any way. It is my view that the justice of the case warrants an order for a retrial.

25. In the result the appeal succeeds. The conviction is quashed and sentences set aside and in its place substituted with an order for a retrial. To this end the Appellant is ordered to be presented before the Senior Principal Magistrate's Court at Kangundo on the

11.12.2020 for the purposes of a retrial.

It is so ordered.

Dated and delivered at Machakos this 10th day of December, 2020.

D. K. Kemei

Judge