Case Number:	Criminal Appeal 184 of 2014
Date Delivered:	20 Dec 2016
Case Class:	Criminal
Court:	High Court at Voi
Case Action:	Judgment
Judge:	Jacqueline Nancy Kamau
Citation:	R M M v Republic [2016] eKLR
Advocates:	Richard Mwaingo Mshai for the Appellant, Miss Anyumba for the State.
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon Orenge K. I. (Ag RM)
County:	Taita Taveta
Docket Number:	-
History Docket Number:	Criminal Case Number 481 of 2013
Case Outcome:	Appeal ordered
History County:	Taita Taveta
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 184 OF 2014

R M M……………..…………………………….... APPELLANT

VERSUS

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

(**From original conviction and sentence in Criminal Case Number 481 of 2013 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon Orenge K. I. (Ag RM) on 7th November 2014)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, Richard Mwaingo Mshai, was charged with the offence of attempted defilement of a girl contrary to Section 9 (1)(2) of the Sexual Offences Act No 3 of 2006. The alternative charge was committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. There was also another Charge Sheet where he had been charged with attempted incest contrary to Section 20(2) of the said Act. The alternative Charge for committing an indecent act with a child was retained.

3. In the third Charge Sheet, the Appellant was charged with the offence of incest contrary to Section 20(1) of the said Act with the aforesaid alternative charge of committing an indecent act with a child still being retained.

4. Notably, when the Charge was read to the Appellant on 23rd December 2013, which this court presumed was the very first Charge that was lodged as it bore a stamp of 23rd December 2013, he pleaded guilty to the charge. A plea of guilty was entered. After the facts were read, he said that he had attempted and he was convicted on his own plea of guilty. After going through the facts of the case, the Learned Trial Magistrate observed that the Appellant ought to have been charged with the offence of attempted incest and directed the Prosecution to amend the Charge.

5. When the matter was mentioned on 30th December 2013, the amended Charge Sheet was read to the Appellant. He admitted the Charge and a plea of guilty was entered. When the facts of the case were read to him the following day, he stated that the facts were partly true and partly false. The Learned Trial Magistrate then entered a plea of not guilty.

6. Before the matter could proceed for hearing on 11th February 2014, the Prosecutor informed the Trial Court that he wanted to substitute the Charge Sheet. The Appellant did not object to the same. When the facts were read to him, he denied the same and a plea of not guilty was entered. He pleaded guilty to the Alternative Charge and a plea of guilty was entered. When the facts were read to him, he said that they were not true.

7. The matter therefore proceeded to trial. After the conclusion of the case, the Learned Trial Magistrate convicted him of the offence of incest and sentenced him to life imprisonment. He, however, discharged him on the alternative charge.

8. The particulars of the main charge were as follows :-

"On the 12th Day of December 2013 at [particulars withheld] Village, Mwanda Location within Taita Taveta County, being a male person caused his penis to penetrate the vagina of Y C a female who was to his knowledge his sister aged 7 years."

9. The particulars of the alternative charge were as follows:-

"On the 12th Day of December 2013 at [particulars withheld] Village, Mwanda Location within Taita Taveta County, intentionally touched the vagina of Y C a child aged 7 years."

10. Being dissatisfied with the judgment therein, on 21st November 2014, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. The said application was allowed and the Petition of Appeal was deemed as having been duly filed and served. The Grounds of Appeal were as follows:-

1. THAT the trial magistrate erred in law and fact by not considering that he was not subjected to DNA test which was contrary to section 109 of the evidence act (sic)**.**

2. THAT the trial magistrate erred in law and fact in finding his conviction by not having assessed the age of the girl (sic)**.**

3. THAT the trial magistrate erred in law and facts by not taking into account that the section 109 of the evidence act was not given the attention as deserved (sic)**.**

4. THAT the trial magistrate erred in law and fact by not considering that the prosecution witnesses were relatives of the complainant.

11. On 19th July 2016, the court directed the Appellant to file his Written Submissions. Instead of doing so, on 6th September 2016, he filed Written Submissions and fresh Grounds of Appeal. The Grounds of Appeal were as follows:-

1. THAT the honourable trial magistrate erred in law and fact by finding that the doctor's (PW 4) evidence was proved by the P3 Form on his sentencing (sic)**.**

2. THAT the learned trial magistrate erred in law and fact by not take (sic) **into consideration the importance of the investigation officer (PW 5) before warranting the conviction** (sic)**.**

3. THAT the learned trial magistrate erred in law and fact by finding PW 1's evidence was corroborated by that of PW 2.

4. THAT the learned trial magistrate erred in law and fact by not take (sic) **into account the evidence of PW 3.**

5. THAT the learned trial magistrate erred in law and fact by failing to appreciate his personal and social circumstances before he pleaded guilty or not guilty before warranting his conviction (sic)**.**

6. THAT the learned trial magistrate erred in law and fact by failing to appreciate the *voire dire* examination of the minor (PW 1) without seeing that the *voire dire* was improper on his sentencing – Sec 124 (sic)**.**

12. The State's Written Submissions dated 27th September 2016 were filed on 28th September 2016. The Appellant filed his Reply to the State's Written Submissions on 9th November 2016.

13. When the matter was mentioned on 9th November 2016, both the Appellant and the State informed this court that they would not highlight their respective Written Submissions but that they would rely on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

14. As this is a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs 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".**

15. Having looked at the parties' Written Submissions, this court found the following to have been the issues that were placed before it for determination:-

a. Whether or not a proper *voire dire* examination was conducted;

b. Whether or not the Prosecution had proved its case beyond reasonable doubt.

16. The court therefore dealt with the said issues under the separate heads shown hereunder.

I. PROOF OF THE PROSECUTION'S CASE

***A. VOIRE DIRE* EXAMINATION**

17. Ground of Appeal No (6) of the Amended Grounds of Appeal was dealt with under this head.

18. The Appellant submitted that the *voire dire* examination was not conducted in accordance with Section 19 and 19 (1) of the Paths and Statutory Declarations Act. He pointed out that the Complainant, Y C (hereinafter referred to as "PW 1") did not respond to the questions that she was asked which amounted to him not having been accorded a fair trial.

19. He stated that when she was asked if she went to Church, instead of giving a "yes" or "no" answer, she said she used to go to Catholic Church. When she was asked what an oath was, instead of giving the meaning of an oath, she gave the duties of telling the truth. Further, he stated that she did not know the meaning of testifying while on oath.

20. On its part, the State submitted that the Learned Trial Magistrate conducted the *voire dire* examination personally and satisfied himself that PW 1 did not understand the meaning of an oath but understood the duty of telling the court the truth and there was therefore no defect in the said

examination. It placed reliance on the provisions of Section 19 of the Oaths and Statutory Declarations Act and the case of **Julius Kiunga M'Birithia vs Republic [2013] eKLR** in this regard.

21. In the case of **Kivevelo Mboloi vs Republic [2013] eKLR** , Korir J outlined the guidance of the Court of Appeal in the case of **Johnson Muiruri vs Republic [2013] eKLR** in which it was stated as follows:-

"We once again with to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:

"Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination , whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). 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, and not be forced to make assumptions."…"

22. Though there is great emphasis that actual questions and answers during the *voire dire* enquiry be recorded, it was the view of this court that it is a strongly recommended practise or procedure to avoid an appellate court making assumptions of the questions asked by a trial court and answers given to it by a minor as was observed in the case of **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (Supra) cited in the case of **Johnson Muiruri vs Republic** (Supra).There was, however, no legal requirement that the same must be done or that if the same is not done, it will prejudice an accused person during trial, unless of course the same causes actual prejudice to an appellant.

23. Bearing in mind that the recommendations in the said case were made prior to the promulgation of the Constitution of Kenya, 2010 and that the provisions of Article 159(2)(d) of the Constitution mandates courts to administer justice without undue regard to technicalities, in the mind of this court, it is sufficient if from the way the proceedings have been recorded in a narrative form, it is abundantly clear that a child witness testifies that he understands the importance of saying the truth and his knowledge of what an oath is before the oath is administered. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out.

24. In both instances, the trial magistrate must also clearly record that the child is possessed of sufficient intelligence to adduce the evidence before giving his opinion of how the evidence shall be adduced, that is, whether the same shall be sworn or unsworn. Additionally, the trial magistrate must record the minor's answer of the consequences of not telling the truth to enable the appellate court determine whether or not the *voire dire* enquiry was properly conducted.

25. Where a trial court opts to record answers only, then it is incumbent upon it to record the questions asked as well. If the above steps are followed, then the *voire dire* enquiry will be deemed to have been in compliance of the provisions of Section 19 of the Oaths and Statutory Declarations Act failing which the trial can only be deemed to have been defective and a nullity.

26. A perusal of the proceedings shows that the Learned Trial Magistrate conducted a *voire dire* examination and recorded the following:-

“Question: What is your name"

Answer: I am called Y C.

Question: Do you go to school"

Answer: [particulars withheld] at Mwanda Class One

Question: How old are you"

Answer: I am six years.

Question: Do you go to Church"

Answer: I go to Catholic Church.

Question: Did you got to Church on Sunday"

Answer: I did not go. I did not have clean clothes.

Question: Do you know the meaning of telling the truth"

Answer: If you tell the truth you are a child of God.

Question: Do you know the meaning of testifying under oath"

Answer: I do not know.

Court: The minor has good understanding of the issues and has sufficient intelligence. However, she does not understand the meaning of testifying under oath. She understands the duty of telling the truth. She will give unsworn evidence.”

27. It is abundantly clear that the Learned Trial Magistrate conducted a very elaborate *voire dire* examination and established that PW 1 had sufficient intelligence and understood her duty of telling the court the truth but because she did not understand the meaning of testifying under oath, she was to give unsworn evidence.

28. The issues raised by the Appellant herein were inconsequential and were intended to split hairs. It is not uncommon for a person to answer a question through an explanation as opposed to giving a “No” or “Yes” answer. The said examination gave this court a clear understanding of PW 1’s ability to tell the Trial Court what had happened to her on the material date.

29. This court was satisfied that a proper *voire dire* examination was conducted by the Learned Trial Magistrate and in the circumstances, Amended Ground of Appeal No (6) was not merited and the same is hereby dismissed.

<u>II. PROOF OF THE PROSECUTION’S CASE</u>

30. Amended Grounds of Appeal Nos (1), (2), (3), (4) and (5) were related and were therefore dealt with under this head.

31. The Appellant contended that there was no proof that PW 1 went to hospital and also questioned why she was taken for the P3 Form two (2) weeks after the alleged incident. He stated that the P3 Form that was produced by George Litungu (hereinafter referred to as "PW 4") had indicated that she had not been escorted by anyone which was not possible as a six (6) year old could not go to hospital all by herself.

32. He also pointed out that the said P3 Form did not indicate when the hymen was broken, the age of the injury, the degree of injury or the type of weapon that caused the injury and that in any event, no bruises or scratch marks were seen in her private parts.

33. In addition, he stated that no medical records were produced to show that she was treated and that he himself was not examined to establish if he was the one who had caused the breaking of PW 1's hymen, which he contended could have been broken by any other thing apart from a male genital organ.

34. It was his further contention that No 91431 PC Edwin Karanja (hereinafter referred to as "PW 5"), did not conduct his investigations thoroughly to establish if there was bad blood between him and A M (hereinafter referred to as "PW 3"), this having been a family matter. He also averred that PW 5 did not also visit the scene of the incident to confirm whether indeed there were any spaces through which PW 1's brother, J M (hereinafter referred to as "PW 2") could have peeped from to see him and PW 1 in their mother's bedroom. PW 3 was the mother to PW 1, PW 2 and the Appellant herein.

35. He was emphatic that there was bad blood between him and PW 3 and that PW 1 and PW 2, who had a different father from him, had falsely testified in court to implicate him in the alleged offence. He averred that since PW 3 found nothing had happened to PW 1, there was no need for her to have reported the matter to the Chief unless there was bad blood between them. He urged the court to disregard her evidence as she had only testified of what she was told by PW 1 and PW 2. He further questioned why the said Chief did not appear in court to testify and why he told PW 3 to take PW 1 to hospital instead of reporting the matter to the police.

36. On its part, the State submitted that PW 3 corroborated PW 1's and PW 2's evidence as she found the Appellant at home. It stated that the Appellant had failed to establish any ill motive by PW 1 and PW 2 so as to demonstrate that they had fabricated the charges against him. It stated that PW 3 made the initial report at the Chief's office which was nearest her home and that as the Appellant did not provide any alibi, the evidence that was adduced by PW 1, PW 2 and PW 3 placed him at the scene of the incident.

37. To establish whether the Learned Trial Magistrate could rely on PW 1's evidence to find the Appellant liable for the offence he had been charged with, this court considered the Proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that stipulates as follows:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

38. PW 1 tendered unsworn evidence which ordinarily would not have been subjected to Cross-Examination. However, the Learned Trial Court allowed the Appellant to Cross-examine her. The

Learned Trial Magistrate found that her evidence was corroborated by the independent witness, PW 2, and PW 4.

39. A perusal of the proceedings showed that PW 1 testified that the Appellant found her washing clothes. He asked PW 2 to go and cook. Without any provocation, he beat her, took her to PW 3's bed where he removed her underpants until the knees and "injured" her using his penis. PW 2 ran to call PW 3 and when she came, the Appellant hit PW 1 with a stick. She identified the Appellant, who was her brother, in the court.

40. PW 2 corroborated PW 1's testimony and said that when he heard PW 1 crying, he peeped through the window which had gaps and saw the Appellant lying on top of PW 1. He ran and told PW 3 of what had happened. He also identified the Appellant, his brother in court. PW 3 confirmed what she had been told by PW 1 and PW 2 and also furnished the court with a copy of PW 1's Birth Certificate showing that PW 1 was aged seven (7) years at the time of trial.

41. PW 4 confirmed that PW 1's hymen had been broken but no other injuries were noted. The Prosecution produced medical treatment notes of 12th December 2013 confirming that PW 1 was seen at 7.00 pm after the Appellant who was said to have been twenty one (21) years, had defiled her. The P3 Form confirmed that PW 1 had a torn hymen.

42. Although the Learned Trial Magistrate relied on PW 2 as an independent witness, this court was reluctant to accept his evidence as was tendered because the said Learned Trial Magistrate did not take him through a *voire dire* examination. This was critical as he was a child aged nine (9) years. He merely swore him without first establishing if he knew the meaning of taking an oath.

43. Be that as it may, this court did not find any fatality in the Prosecution's case because the medical treatment notes and the P3 Form adequately corroborated PW 1's evidence that she had been defiled.

44. The next question was, who defiled PW 1" As was rightly pointed out by the State, the Appellant did not present any alibi to remove him from the scene of the incident. PW 3 found him at the scene of the incident, squarely placing him at the said scene. He failed to adduce evidence that showed that PW 1 had any ill intentions to frame him for the offence he was alleged to have committed.

45. The Appellant presented unsworn evidence. This had no probative value as the Prosecution did not subject it to cross-examination to test its veracity. In the absence of any other plausible explanation, the Appellant's presence at the scene afforded him an opportunity to have committed the alleged offence as provided for in Section 7 of the Evidence Act.

46. The said Section provides as follows:-

"Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction are relevant."

47. In the premises foregoing, Amended Grounds of Appeal Nos (1), (2), (3), (4) and (5) were not merited and the same are hereby dismissed.

SENTENCING

48. Although this was not an issue before this court, it found it necessary to address the question as to

whether or not the sentence that was meted on the Appellant was harsh or manifestly excessive to warrant interference by this court.

49. It was not in dispute that PW 1 was aged six (6) years at the time of the alleged offence. Notably, proof of a complainant's age is critical as it has a bearing on the sentence that a person convicted of the offence of incest should be given under Section 20(1) of the Sexual Offences Act.

50. The said Section provides as follows:-

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

51. The Learned Trial Magistrate was correct when he observed that he had the discretion of sentencing the Appellant to life imprisonment as PW 1 was under the age of eighteen (18) years. He stated that the only available sentence was life imprisonment. This was not entirely the correct position of the law. The minimum sentence the Learned Trial Magistrate could have imposed on him was ten (10) years with a maximum of life imprisonment.

52. As was held in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR,** the phrase **"shall be liable to imprisonment for life"** does not, however, connote a mandatory sentence but rather a maximum sentence. In the said case, the Court of Appeal rendered itself as follows:-

"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:

"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".

53. So as to come with a good assessment of the appropriateness of the length of the sentence that was imposed on the Appellant herein, this court had due regard to the provisions of Section 8(2) of the Sexual Offences Act that provide a minimum sentence of life imprisonment where a person has been found guilty of having defiled a child aged eleven years or less.

54. This was the same consideration that this very court made in the case of **Dominic Mbogho vs Republic [2015] eKLR** where it reduced the sentence of life imprisonment to twenty five (25) years imprisonment as "liable to life imprisonment" did not connote that a maximum sentence is mandatory.

55. In that case, this court rendered itself as follows:-

"**Bearing in mind the provisions of Section 8(3) of the Sexual Offences Act that provide a**

minimum sentence of twenty (20) years where a person has been found guilty of having defiled a child between twelve (12) and fifteen (15) years against the backdrop that PW 1 was the Appellant's daughter and she was aged fourteen (14) years at the time of the alleged offence, this court was of the considered view that a sentence of twenty five (25) years imprisonment for the offence the Appellant was charged with would still be within what is prescribed by the law. This is because there were no aggravating factors such as the Appellant infecting PW 1 with a sexually transmitted disease or Human Immunodeficiency Virus (HIV).

56. Although it was un-imaginable that a brother could forcibly have sex with his young sister, there was no aggravating factor to have warranted a maximum sentence in this case. He was charged under a provision of the law that gives a court discretion in the sentencing.

57. Bearing in mind that the Appellant was a first offender, it was the view of this court that the sentence that was imposed on him by the Learned Trial Magistrate was harsh. However, as PW 1 was aged six (6) years at the material time, it found that a penalty of thirty (30) years would be proportionate to the offence he had been charged with.

CONCLUSION

58. Accordingly, having considered the Appellant's Petition of Appeal, the Written Submissions and the case law that was relied upon herein, this court came to the firm conclusion that after weighing the case that was presented by the Prosecution against the Appellant's evidence, his defence did not shake that of the Prosecution. Indeed, the Prosecution had managed to prove its case to the required standard, that of proof beyond reasonable doubt.

DISPOSITION

59. For the foregoing, reasons, the upshot of this court's decision was that the Appellant Petition of Appeal that was lodged on 21st November 2014 was not successful. This court therefore affirms the conviction herein.

60. However, for the reasons mentioned hereinabove, this court deemed it fit to set aside the sentence of imprisonment for life that was imposed upon the Appellant by the Trial Court and instead sentence him to thirty (30) years imprisonment which is to run from the date he was convicted by the Trial Court for the offence of incest by male.

61. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **DECEMBER** 2016

J. KAMAU

JUDGE

In the presence of:-

Richard Mwaingo Mshai…….Appellant

Miss Anyumba……………..… for State

Josephat Mavu– Court Clerk

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