IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 124 OF 2014

BETWEEN

ISAACK MOHAMMED BONGA ……..……. APPELLANT

AND

REPUBLIC ……..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Ang'awa, J.) dated 29th July 2010

in

H.C.CR.A No. 1 OF 2009)

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JUDGMENT OF THE COURT

1. The appellant was charged with defilement contrary to **section 8 (1**) as read with **section 8 (2)** of the **Sexual Offences Act, 2006**. The particulars of the offence were that on the 22nd day of June 2008 in Uasin Gishu District, of the Rift Valley Province [the appellant] unlawfully defiled P.S., a child aged 8 years old.

2. After a full trial, the appellant was found guilty, convicted and sentenced to 20 years' imprisonment.

3. The appellant's first appeal to the High Court against that conviction and sentence was unsuccessful. The High Court enhanced the sentence to life imprisonment, holding that the complainant was under 11 years old. The appellant preferred a second appeal to this Court.

4. In his supplementary memorandum of appeal filed through S.M. Omae & Company Advocates, the appellant faulted the High Court for admitting the evidence adduced by a doctor who purported to be the maker of a P.3 form when he was not; for failing to find that the record of appeal did not show the language used during the trial; for failing to find that no valid *voire dire* examination was conducted; for failing to evaluate the evidence tendered appropriately, and for enhancing the sentence without notice, warning or cross appeal.

5. Before we consider the grounds of appeal, it is important that we set out, albeit briefly, a summary of the evidence that was tendered before the trial court. The complainant was 8 years old when she

testified. Before she testified as to how the alleged offence was committed, all she told the court is recorded as follows:

> ***"I am 8 years old in standard 3 at [particulars withheld] Primary School. We stay at Road Block. My mother is called E.S. I go to Alliance Baptist Church. I will tell the truth."***

The trial magistrate was satisfied that the above amounted to a complete **voire dire** examination and proceeded to order:

> ***"Witness to be affirmed as she knows essence of saying the truth."***

6. The complainant stated that on the material day at about 7.00 p.m., the appellant, whom she knew, went to their house. He found her carrying a child on her back. He tried to seduce her by offering to give her Kshs.20/= if she agreed to his advances but she refused and ran away. However, the appellant grabbed her, threw her on a bed, removed his penis and inserted it into her vagina. As that was happening the child she was carrying was still on her back, the complaint stated.

7. While the appellant was on top of the complainant, their house maid and a neighbor, PW3, found him there, and he promptly ran away, the complainant stated. The complainant was bleeding from her private parts. She was taken to Moi Teaching and Referral Hospital where she was treated and discharged. Thereafter she was taken to Bahari Police Post where a statement was recorded and a P.3 form issued.

8. The complainant's mother, PW2, testified that the girl was born on 6th August, 2008. On the material night at about 7.30 p.m. the complainant and PW2's house help went to her shop. The girl was crying and was bleeding from her private parts. The complainant reported that the appellant had defiled her. PW2 rushed to Baharini Police Post where she made a report, and thereafter took the girl to Moi Teaching and Referral Hospital.

9. **Loise Maleya, PW3**, was a neighbor of PW2. On the material day, while walking towards a shop, she saw the appellant entering the house of PW2. Shortly thereafter, PW2 heard PW1 and a baby crying. She decided to go inside the house of PW2 to find out what was happening. As she approached the house, PW3 saw the appellant dash out of the house while zipping his long pair of trousers. The complainant told PW3 that the appellant had defiled her. The complainant was bleeding from her private parts. Thereafter PW3 escorted the complainant to her mother's shop and helped to take her to hospital.

10. **Dr. Joseph Imbezi, PW4,** was working at Moi Teaching and Referral Hospital. He was not the one who examined and treated the complainant, he only produced a P.3 form in respect of the complainant that had been completed and signed on his behalf by an unidentified medical officer, who stated that the complainant was 7 years old. The P3 form indicated that the complainant had lacerations on the labia minor and the hymen was torn. Examination of the genitalia revealed that there had been penetration.

11. The evidence given by **P.C. Stanley Kesier, PW5,** the Investigating Officer, was a bit disjointed. He testified that on 12th June 2008 at about 7.30 a.m. he was at Bahari Police Post when a person went there and reported that he had been assaulted. Earlier on, the mother of the complainant had gone there and reported that her child had been defiled. When PW5 saw the person he realized that his appearance fitted the description that he had been given of the person who had defiled the complainant and so proceeded to arrest him. Thereafter the complainant went to the police post and identified the appellant. PW5 issued the complainant with a P3 form and referred her to Moi Teaching and Referral Hospital for treatment and completion of the form.

12. In his defence, the appellant stated that on 22nd June, 2008 he left his house at 1.00 p.m. and went to Roadblock Trading Centre. He visited a local bar and shared a table with a certain lady while having some drinks. At about 7 p.m. the complainant's mother (PW2), whom he claimed was his girlfriend, entered the bar and asked him why he was seated with the other woman. PW2 hit him in the eyes and in turn he pushed her.

An altercation arose and as he had been hurt he decided to go to Baharini Police Post to file a complaint, only to be arrested and placed in police cells until 27th June, 2008 when he was taken to court. The plea was not taken because, according to the Investigating Officer, the P3 form had not been filled. He was returned to court on 30th June, 2008 when plea was taken.

13. **Mr. Ombogo,** learned counsel for the appellant, submitted that the charge was defective since the particulars of the offence of defilement had not been sufficiently disclosed as required under **section 137** of the **Criminal Procedure Code**. He added that in a charge of defilement under **section 8(1)** of the **Sexual Offences Act**, penetration by the male genital organ into a child's genital organ is critical. Such particulars were missing in the charge, he stated.

14. Mr. Ombogo further submitted that the trial court erred in admitting the evidence of PW4, who had neither examined the complainant nor filled the P3 form. No treatment notes were produced and no reason was given for that omission. The P3 form, dated 26th June, 2008, indicated that the approximate age of the complainant's injuries was hours, yet the charge sheet indicated that the offence was committed on 22nd June, 2008.

15. Counsel's further submissions were that the language of the proceedings was not indicated and that the first appellate court erred in enhancing the sentence. In respect of the last submission, he cited this Court's decision in **FRANCIS MBURUGU MUCHENA v REPUBLIC [2011] eKLR**. In that appeal, the appellant had been sentenced by the trial court to a term of 20 years' imprisonment for manslaughter. On appeal, without any notice of enhancement of sentence, the State counsel urged the court to enhance the sentence. The court enhanced it to life imprisonment. On a second appeal, this Court faulted the first appellate court for enhancing the sentence without a formal notice having been served upon the appellant.

16. Mr. Ombogo further submitted that the High Court erred in law in upholding the appellant's conviction when the complainant had testified without any valid *voire dire* examination having been conducted. The questions put to the child and the answers that were given ought to have been recorded, counsel submitted, citing **JOHNSON v REPUBLIC [1983] KLR 445.**

In his view, had the learned Judge carefully analysed the evidence tendered before the trial court she would have come to the conclusion that the conviction was unsafe.

17. **Mr. Omwega**, **Assistant Deputy Public Prosecutor**, conceded the appeal. He agreed with the appellant's counsel that the particulars of the charge were wanting as they did not indicate that the appellant's genital organ had penetrated by the complainant's genitals. He also conceded that no reliance should have been placed on the P3 form that was produced by PW4 as he was not the author of the same and the treatment notes that were relied on to complete it had not been produced.

18. But as regards the language that was used by the trial court, Mr. Omwega pointed out that on 30th June, 2008 when the plea was taken the trial court indicated that the language of the court was English translated to Kiswahili. The record showed that the appellant had cross examined all the witnesses, which implied that he followed the proceedings.

19. With regard to enhancement of sentence, Mr. Omwega submitted that the trial magistrate had no power to pass a sentence that was contrary to the prescribed mandatory one of imprisonment for life. The sentence of 20 years' imprisonment was therefore illegal and the first appellate court was under a legal obligation to correct that illegality by passing the appropriate statutory sentence.

20. Turning to the *voire dire* examination of the complainant, Mr. Omwega submitted that it was not mandatory to put down all the questions and answers.

21. We have considered the entire record of appeal as well as submissions by counsel. It is not in dispute that the particulars of the charge were insufficient in law. **Section 134** of the **Criminal Procedure Code** requires that all the necessary particulars of an offence be stated. The section provides

as follows:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

22. The particulars of the offence with which the appellant was charged simply stated that he **"unlawfully defiled"** the complaint. **Section 8(1)** of the **Sexual Offences Act** states that:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

The word "**penetration**" is the operative word and **section 2** of the **Sexual Offences Act** defines it to mean "**the partial or complete insertion of the genital organs of a person into the genital organs of another person".**

23. Whereas it may be argued that the appellant was well aware of the nature of the offence he faced, we must point out that in a defilement case it is critical that the full particulars of the alleged offence be set out. However, we think that no failure of justice was occasioned to the appellant by the manner in which the particulars of the offence were crafted.

This, in our view, is an omission that is curable under **section 382** of the **Criminal Procedure Code.**

24. The complainant was a child of tender age. The trial court was therefore obliged to comply with the provisions of **section 19** of the **Oaths and Statutory Declarations Act, Cap 15** which states as follows:

> ***(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.***
>
> ***(2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.***

25. In **JOHNSON MUIRURI v REPUBLIC [1983] KLR 445**, this Court stated on pages 448 and 449 as follows:

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.***
>
> ***In PETER KIRIGA 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 event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth ……***

……

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 forced to make assumptions."

26. The trial court did not carry out a **voire dire** examination in the manner specified above. The effect of the failure to strictly comply with the stipulated requirements on the trial will depend on the circumstances of each case. See this Court's decision in **SAMUEL WAHINI NGUGI v REPUBLIC [2012]eKLR.**

Here, the trial court did not make any effort to determine whether the child understood the nature of an oath and whether she was possessed of sufficient intelligence. In the circumstances, we find that the trial was vitiated.

27. But that is not all. The evidence of PW4 was of very little probative value, if at all. The P3 form that he produced had been signed by someone else, apparently for and on behalf of PW 4. PW4 had not personally examined the complainant and neither did he tender to the court the examination notes that were relied upon by whoever filled the P3 form. There was therefore no medical evidence that could be relied upon to prove that the complainant had been defiled.

28. The evidence tendered by the other witnesses regarding arrest of the appellant had material contradictions. PW2 said that on the material night when she went to Roadblock bar to look for the appellant he looked away and hid his face. When she enquired from him what he had done, the appellant assaulted her. On the other hand, PW3 told the court that after the appellant defiled the complainant he was arrested by neighbours. None of the persons who effected the arrest, if at all, was called as a witness. The Investigating Officer, PW5, told the court that the appellant went to Baharini Police Post to make a report about an assault incident. But in cross examination he said that PW2 informed him that the appellant had been arrested and beaten by members of the public.

29. If the first appellate court had carefully re-evaluated the evidence as required, it would have come to the conclusion that there were various gaps in the prosecution case that rendered the conviction unsafe.

30. In view of the foregoing, we allow this appeal, quash the conviction and set aside the sentence to life imprisonment that was passed against the appellant. The appellant is set at liberty unless otherwise lawfully held.

DATED and DELIVERED at ELDORET this 14th day of June, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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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