REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 74 OF 2017

PAUL KIMANI WANJIKU…….……...…….APPELLANT

VERSUS

REPUBLIC……....RESPONDENT

(An Appeal from the Resident Magistrate's Court at Wang'uru SO Case No.4 of 2017 delivered by Hon. P.M Kiama on 13th November 2017)

J U D G M E N T

1. The Appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. The particulars of the offence are that on 17th June 2017 at [particulars witheld] village within Kirinyaga County, the Appellant unlawfully and intentionally caused his penis to penetrate the virgina of PN a child aged six years. The Appellant was also charged with an alternative charge of indecent act with a child contrary to **Section 11(1) of the Sexual offences Act.**

It was alleged that on the 7th day of June 2017 at [particulars witheld] village within Kirinyaga County intentionally touched the virgina of PN a child aged six years with his penis.

2. The Appellant pleaded not guilty and after a full trial he was convicted on the charge of defilement and was sentenced to life imprisonment. The Appellant was aggrieved with both the conviction and sentence and filed an amended petition of appeal which was amended vide an order of this court issued on 15th August 2019.

3. The Appellant relied on the following grounds:-

a. By convicting the accused on a charge not proved beyond reasonable doubt

b) By not interrogating that the birth certificate was procured 7 years after birth after the accused was charged and in custody, that the document was suspect as it was not in compliance with the registration of births legislation and without the evidence of the Registrar of Births and Deaths.

c) By conducting voire dire without directing a fundamental question to the minor as to the child's knowledge of telling the truth and lies.

d) By accepting the evidence of the minor in the face of overwhelming averments and admissions that the child was beaten, threatened and coerced to implicate the accused

e) By failing to warn himself on the need of corroboration of the evidence of the child

f) By accepting the evidence of the child which was contradictory or inconsistent

g) That there was evidence before the court that the child had been previously defiled, was on treatment on HIV and that the previous defilement was not reported which omission would have put the child's credibility in issue

h) That there was no medical evidence of willful penetration by the accused's penis and the conviction was wrongful

i) on the issue of burden of proof and erred by rejecting the defence of the accused

j) Misdirected himself when he held the offence carries a minimum sentence

The facts of the case that the complaint PN is a minor who at the time the offence was committed was aged six years and a class one pupil at [particulars withheld] Primary School. On the material day she had gone to school. Her mother RWR (PW1) had left home to go and attend a funeral. She returned at 7pm and on reaching the house she found the complainant outside the house. PW1 enquired why the complainant had not gone to fetch firewood. The complainant told her that she was left by the other children. PW1 went inside the kitchen and while there she heard the complainant crying. On asking her why she was crying she told her she had not left food for her.

PW1 prepared food and fed the child who had also complained of headache and she had given her brufen. Later at 10.30 pm PW1 checked on the child. The child had been defiled sometimes in April 2017. So PW1 used to change her clothes every day. The child cried and refused to be checked. PW1 managed to check the child and found the private parts were dirty and swollen. She suspected that the child had been defiled and so she beat her and threatened her with a knife. It is then that the complainant narrated to her that when she came from school, she went to the home of Mama Nduta where she met the accused Kimani of where Nyamas were sold. She informed her that Kimani held her by the hand and took her to the place of meat, left the main road and went to the house of Kimani where the Appellant who is Kimani placed her on the bed, removed her pant and inserted his penis in her virgina. The Appellant threatened to cut her hand and have her brains taken out if she told anyone. The Appellant gave the child Kshs.350 and told her to leave. The child went to the church of Daily and found her mother inside. The child bought juice and sweets then went to the next shop

PW1 told the child to go and bathe and clean her clothes. The next day at about 6 am she called her daughter L.W and also reported to the village incharge. She was advised to go and report at PI Police Post. She reported and was referred to Kimbimbi Sub-County Hospital.

The child was examined by Doctor Kenneth Munyi (PW5) a medical officer based at Kimbimbi Sub-County Hospital on 12th June 2017. The Doctor testified that the complainant alleged to have been defiled by somebody well known to her. She had taken a shower and washed her clothes. On external examination of the genitalia, there were tears on the virgina. The hymen was not intact. There was virginal discharge. No sperms were seen. The patient was on ARVS. He produced treatment notes and the P3 form. The matter was investigated by CPC Magdaline Mbula (PW6) of Wanguru Police Station. He caused the Appellant to be arrested and charged with this offence.

The trial magistrate found that the Appellant had case to answer and he was put on his defence. The Appellant gave a sworn statement and told the court that on 7th June 2017 he had gone to the farm. He did not see the complainant that day. He did not touch her and did not give her money. He told the court that he had known the family of the complaint for five years. In cross-examination the Appellant admitted that the complainant knew him.

The trial magistrate found that the charge set out under **Section 8 (2) of the Sexual Offences Act** was proved beyond any reasonable doubts and convicted the Appellant.

When the matter came up for directions the parties agreed to canvass the appeal by way of written submissions. Learned counsel for the Appellant, Mr Morris Njagi filed submissions. He raised four issues, namely;

- Age of the minor

- Proof of penetration

- Credibility on the testimony of the minor

- Defence of alibi;

On penetration he submits that the evidence of the complainant was obtained illegally through beating and the court ought to have warned itself while taking the evidence of the victim. That penetration was not proved to the required standard. He challenged the evidence of penetration as the child had been defiled before and that the Appellant was not subjected to medical test. It is submitted that the prosecution filed to discharge its burden of proof on penetration and the age of the child.

> (a) The Appellants faults the birth certificate on the ground that it was obtained after the Appellant was charged. The Appellant has taken issue with Judgment of the trial magistrate and submits that it contravenes the provisions of **Section 169 of the Criminal Procedure Code.** It is submitted that **Section 169 of the Criminal Procedure Code** (Cap 75 Laws of Kenya) requires every Judgment to contain the following:-
>
> **a) The point or points of determination.**
>
> **b) The decision thereon**
>
> **c) The reason for determination**.

He relies on ***Kigotho -vs- Republic (1967) EA 445 and Nyanaba -vs- Republic (1983) E.A 599.*** Where the Court of Appeal has stated that-

> ***"Every Judgment must comply with Section 169 of the Criminal Procedure Code and in particular must contain the point or points for determination the decision there on and the reasons for the decision."***

The Appellant submits that the trial magistrate mis- apprehended the testimony of the minor at ***voire dire*** and the child of tender years.

Finally, it is submitted that the trial court acted on wrong principles while sentencing and the Appellant was denied the benefit of mitigation in sentencing.

The state opposed the appeal and filed submissions through the learned **Counsel F.S Ashimosi**. It is submitted that the trial magistrate did conduct a proper ***voire dire*** examination and established that the minor could not give a sworn statement. The Respondent relies on the case of ***John Muiruri -v- Republic 1983 KLR*** where it was held that –

> ***" Where in any proceedings before any court, a child of tender years is called as a witness the court is required to form an option, on voire dire examination whether the child understands the nature of the oath in which case even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received. If the opinion of the court he is posed of sufficient intelligence and understands the duty to speak the truth. In the latter event an accused person shall not be liable to be considered on such evidence unless it is corroborated by material evidence in support thereof implicating him. (Section 19 Oaths and Statutory Declaration Act Section 124 Cap 80)."***

The Respondent submits that failure to observe the provision as to ***voire dire*** does not automatically initiate conviction. He refers to the Court of Appeal decision in ***Maripet Loon Komok -vs- Republic (2016) eKLR*** where the Court of Appeal stated that –

> ***" In appropriate cases where voire dire is not conducted but there is sufficient independent evidence to support the charge, the court may still be able to uphold the conviction."***

The Respondent submits that the key ingredients of the charge includes proof of age of the complainant, proof of penetration and proof that the Appellant was the perpetrator.

It is the submission by the Respondent that the key ingredients were proved. That on age the complainant did testify and told the court that she was six years and a birth certificate to support her evidence was produced. That under **Sexual Offences Act- Rules of Court) LN 101/2014**, it is provided that the age of the complainant may be determined by way of birth certificate any school document, baptismal card or any other similar document they submit that the age of the complainant was proved.

4. On penetration, it is submitted that the complainant adduced evidence that the Appellant inserted his penis in her virgina. That PW5 who filled the P3 form found that the hymen was not intact, there were tears on the virgina discharge and pus cells. That under **Section 2 of the Sexual Offences Act,** penetration is defined as ***"partial or complete insertion of the genital organs of a person into the genital organ of another person"*** He submits that in totality, penetration was proved.

On identification of the perpetrator, it submitted that the appellant was known to the complainant and the evidence tendered was of recognition which is weighty and have probative value.

5. On the issue of medical evidence the prosecution relied on several case law to state that it is now trite that medical evidence is not the only way of proving defilement.

In ***George Kioji -v- Republic Criminal Appeal No 270/2012 (C.A)***

> ***" where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person."***

In ***Mark Oyori Moses -v- Republic (2013) eKLR*** Court of Appeal, it was stated-

> ***" Many times, the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration whether on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl organ."***

They submit that it is not a must that medical evidence be availed to prove penetration as long as there is evidence as long as there is evidence to demonstrate that there was penetration.

On the issue of lack of corroboration of PW2's testimony the prosecution submitted that section 124 of the Evidence did not require corroboration of such evidence. they also relied on the case of ***JWA VS R 2014 eklr*** and on **section 143 of the Evidence Act** supported by the cases of ***Benjamin Mbugua Gitau vs Republic 2011 Eklr COA*** where it was held that no particular number of witnesses are needed to prove a fact unless the law requires so similarly **Keter vs Republic 2017 EA 135** where it was stated that the prosecution is not obligated to call superfluity of witnesses but only such witnesses as may be sufficient to proof a charge beyond any reasonable doubts.

On the issue of inconsistencies alleged by the appellant the prosecution submitted that in the case of ***Willis Ochieng Odero vs Republic 2006 Eklr*** the Court of Appeal held that such contradictions in prosecution evidence particularly with regard to date indicated in P3 forms and the date of the offence, is not a ground for quashing a conviction as stated under **section 382 of the criminal procedure code**.

It is the contention by the State that the case was proved beyond any reasonable doubts and the appeal ought to be dismissed with costs.

I have considered the appeal, the submissions and the proceedings before the trial court. As it is has been submitted by the parties, this being the 1st appellate court, I have a duty to analyse the evidence, evaluate it and reach my own independent finding. The leading authority on the subject is the case of ***Okeno -vs- Republic (1972) E.A 32*** where the court held that-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Pandya -vs- Republic (1957) EA 336 and Appellate Court own decision on the evidence. The first Appellate Court must itself weight conflicting evidence and draw its own conclusion; (Shantilal M. Ruwala vs Republic (1957) E.A 570). It is the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate his findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses, see Peter's vs Sunday Post (1958) E.A 424."***

See also ***Suleiman -vs- Republic (1987) 219.***

6. The prosecution called six witnesses. The complainant testified as PW2 and narrated how she met the Appellant who led her to his, house laid her on a bed and defiled her. She then gave her ten shillings and threatened to cut her hand and remove her brain if she told anyone. The complainant gave unsworn defence after the court found that she did not understand the meaning of oath. After giving evidence she was not cross-examined. The complainant knew the Appellant. This fact was admitted by the appellant. The offence was committed in broad day light. The complainant could not have failed to recognize the Appellant.

PW1 was the complainant who testified that she met her child at home crying. PW1- gave her food. The child was not feeling well. She checked the private parts and realized there was dirt, discharge and reddening as well as swelling. She was also unkind to the child as she threatened her with a knife and beat her. It is no wonder that the child could not report to her it that was the kind of brutal mother she was. PW2 testified that it is the child who told her that the accused had defiled her. PW3 was a sister to the complainant who was informed about the incident by PW1 and they decided to report to the police.

The other witness was PW5 the doctor who confirmed that he examined PW2- and found evidence of defilement. He produced the P3 form and treatment notes. PW4 arrested the Appellant and handed him over to the PW6- the investigating officer who charged the appellant with this offence. Based on this evidence and the submissions the issue which arises for determination is whether the charge of defilement was proved beyond any reasonable doubts. The Appellant was charged under ***Section 8(1) (2) of the Sexual offences Act*** which provides:-

> ***" 8(1) (2) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

As it has been rightly submitted, the ingredients of the charge of defilement which the prosecution must prove beyond any reasonable doubts are-

- Age of the child

- Penetration

- Perpetrators

Age of the child:

The evidence tendered shows that the State relied on a birth certificate to prove the age of the minor. This in my view was prima facie evidence of prove of age. The law provides that the age of the complainant be proved and or be determined by way of a birth certificate among other documents as submitted by the respondent, see **Sexual Offences Act (Rules of Court) 2014**. There is nothing on the certificate to suggest that it is not authentic. The fear by the appellant that it was not issued procedurally is misplaced. The document speaks for itself as it is certified that it is compiled from an entry/return in the Register of Births in the District. It bears authorization number 787 of 19th June 2017. It also bears a certificate that it is issued in accordance with the law and shall be received as evidence of dates and facts therein contained without any other proof of such entry.

7. Proof of age in Sexual Offences is crucial as it determines the section under which an offender will be charged and the penalty. There is no doubt that the birth certificate was obtained after the appellant was charged. It is trite that the prosecution is at liberty to avail evidence at any stage before the close of the prosecution case. **Section 150 of the Criminal Procedure Code** provides:-

> ***" 150. A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

This section extends to the evidence which such witnesses will tender in court. It must be produced at a stage where the defence will have an opportunity to challenge and test the evidence. In this case the prosecution called PW6 before the close of their case. She produced the birth

certificate and was cross-examined. There was prejudice.

The rational under this provision is that the prosecution bears a heavier burden in a criminal case to prove the charge beyond any reasonable doubts. I find that the birth certificate is authentic and sufficiently proves the age of the minor irrespective of when it was procured. In a persuasive decision in the ***Court of Appeal of Uganda, Francis Omuroni -vs- Uganda, CR. Appeal No. 2/2000*** it was observed as follows:

> ***" In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and commission sense……"***

I find that the prosecution proved the age of the complainant beyond any reasonable doubt.

Penetration:

The second key ingredient of the charge of defilement is penetration. This must be proved mainly by the evidence of the complainant; that is the victim of the sexual assault. There is a contention that the complainant was defiled previously in April 2017 and PW1 – did not take action. That this raises questions of credibility on the testimony of the complainant. I find that the fact that she was defiled before does not mean that subsequent complaints of defilement cannot be made. The offence of defilement is not proved by the absence of the hymen only, it is dependent on prove that the victim is a child, prove of penetration and identification of the perpetrator. It is now well settled that medical evidence is not the only way of proving the offence of defilement. The Court of Appeal has made progressive binding decisions that if the court is satisfied there is evidence beyond any reasonable doubts that, defilement was perpetrated by the accused person the court can proceed and convict. The key consideration is whether the court is satisfied that the complaint is telling the truth. See ***George Kioji -vs- Republic and Mark Orori Moses- vs- Republic*** (supra). In this case, penetration was proved beyond any reasonable doubts with the evidence of the complainant who the court found was believable. The trial magistrate had the opportunity to see the complainant and assess her demeanor. I have no reason not to rely on that finding. Furthermore, the evidence by the complainant that she was defiled was corroborated and in deed confirmed by the evidence of PW5 Dr. Munyi who examined the complainant and found that there were tears on the virgina, hymen was not intact and there was virginal discharge. There was no presence of spermatozoa but the child confirmed that she took a bath and washed her clothes before the examination. The evidence of PW5 proves that there was penetration. The definition of penetration under the Sexual Offences Act is partial or complete insertion of the genital organ of a person into that of another. There can be no doubt from the evidence tendered that there was penetration.

Identity of the Perpetrator:

The complainant testified that it is the Appellant who she knew before who defiled her. The appellant admitted that he knew the family of the victim well and they had lived together as close neighbours for five years. The complainant could not have failed to recognize the appellant as the perpetrator. The appellant stated that his defence was not considered by the trial magistrate. The record shows that the defence was considered at page39 of the record. On evaluating the evidence by the prosecution and the defence of alibi, it is my finding that the appellant was in the neighbourhood on that material day. When cross-examined, he said his house was about 250 metres from the complainant's home. His defence of alibi was dislodged by his own admission that the complainant knew him and could therefore not have mistaken him for another. This offence was committed at 5.00 pm at which time he could have done his work in the farm and finished. I find that the defence was a mere denial and the alibi was dislodged. The child had absolutely no reason to frame him. Though she was beaten and threatened by the mother she did give evidence in court and identified appellant as the perpetrator. The appellant has also raised the issue that the trial magistrate was in error in not warning itself of the damages of convicting on the evidence of complainant without corroboration. He has relied on the case of ***Nyanamba-v- Republic 1983 KLR 599 and Republic -vs- Cherop Kinei (1939) 3 E.A C.A 124.***

The appellant is behind time as the law has been amended and there is now no requirement for corroboration of the evidence of victims of Sexual Offences. The authorities cited were before enactment of **Sexual Offences Act by Act No. 3 of 2006 and Section 124 of the Evidence Act**. The history behind these amendments is that the law required corroboration in Sexual Offences and yet these are offences which are not committed on the ***'roadside'*** so as to attract eye witnesses. It is now well settled that the corroboration is not required in **Sexual Offences.** In a recent binding decision by the Court of Appeal in ***JWA -vs- Republic (2014) eKLR*** it was stated as follows:-

> ***" We note that the appellant was charged with a Sexual offence and the provision of Section 124 of the evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a 'voire dire' examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."***

The trial magistrate found that the testimony of the complainant was believable. **Section 124 of the Evidence Act** provides:-

> ***" Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. 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."***

This notwithstanding the evidence of the complainant (PW2) was corroborated by the medical evidence in ***Mbimbi -vs- Republic (1983) KLR 345*** cited by the appellant states ***"corroboration is no more than something tending to confirm other evidence"***

The ground of appeal is without merits.

8. The appellant has faulted the investigations which he submits that they were wanting. This again the appellant says led to the case ending up without material corroboration to the child's story. I believe I have said enough on the issue of corroboration. I would add that the appellant was placed at the scene of the crime by the complainant who admittedly was well know to her. It is trite that, ***" No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact"*** see **Section 143 of** the **Evidence Act.**

The Court of Appeal in ***Benjamin Mbugua Gitau -vs- Republic (2011) eKLR*** held;

> ***"This court has stated that there is no particular number of witnesses who are required for proof of any fact unless the law so requires see Section 143 of Evidence Act."***

In Keter -vs- Republic **(supra) the court stated that;**

> ***" The prosecution is not obligated to call a super fluity of witnesses, but only such witnesses as are sufficient to establish the charges beyond any reasonable doubts."***

The prosecution called witnesses who were key and material in this case. There was no witness who was key in the circumstances of this case who was not called or withheld with ulterior motives. On the issue of ***voire dire*** examination, the trial magistrate was alive to the requirement for the examination.

Section 19(1) of the Oaths and Statutory Declarations Act provides:-

> ***" 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 CAP. 15 Oaths and Statutory Declarations [Rev. 2018] Section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."***

The trial magistrate found that the child did not understand the meaning of the oath. Failure to understand the meaning of oath does not mean that the child is not believable. All what the court needed to satisfy itself is that the child was possessed of sufficient intelligence to justify reception of her evidence and understands the duty to tell the truth. Upon conducting a ***voire dire*** examination, the court is supposed to determine whether to take her evidence on oath or unsworn. In this case the complainant did not understand the meaning of oath but had told the court that they were taught in church not tell lies. The trial magistrate properly proceeded to taken the victims evidence after v***oire dire*** examination. It was proved that she was six years and therefore a child of tender years.

Finally, on the Judgment of the trial magistrate, I find that he complied with the provision of **Section 169(1) of the Criminal Procedure Code.** He did not list down the issues for determination and gave reasons for determination. There is no particular manner that the trial magistrate is supposed to pronounce his Judgment provided that it complies with Section 169. Writing of Judgment is an art and different judicial officers will craft their judgments in different ways but communicate their decisions. I therefore see no reason to fault the manner in which the Judgment was pronounced.

Having said that, I now have to address an issue which arises from the proceedings before the trial magistrate. Though the appellant has not raised it, as a 1st appellate court, I have a duty to evaluate the evidence and make my own independent finding. Mine is not to confirm the conviction by the trial court, the Appellant has a right to expect that the evidence will be subjected to a fresh evaluation and analysis after which this court will make its independent finding, see **Okeno -vs- Republic** (supra).

The major concern is that from the record the complainant was not cross-examined. The trial magistrate has not indicated why the complainant's evidence was not subjected to cross-examination. It would seem that the trial magistrate treated the unsworn testimony of the complainant as he would treat that of an accused who opts to give unsworn statement in his defence. This was a grave error by the trial magistrate as it violated the right of the appellant to a fair trial. There is no indication as to whether the appellant wan given the opportunity to cross-examine and opted not to. This being a court of record, I would go by what appears on the record which is that the appellant was not given an opportunity to cross-examine the complainant. There was serious prejudice as his right to fair trial was breached. The conviction was dependent on the evidence of the complainant and therefore its veracity needed to be tested in cross- examination.

When a person called by the prosecution as a witness gives evidence that evidence must be subjected to cross-examination unless the adverse party opts not to cross-examine. The complainant gave unsworn evidence because she did not understand the meaning of oath. The fact that a minor witness does not take oath or affirmation does not rule out cross-examination.

In a persuasive decision by Uganda Supreme Court in the case of **Sula -vs- Uganda (2001) 2 E.A,** the court observed as follows on child witnesses;

> ***'Although an accused person is not liable to cross-examination if he choses to give unsworn testimony, the law does not prohibit. The cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who give evidence not on oath is liable to cross-examination to test the veracity of his or her evidence."***

Here at home in ***Criminal Appeal No.326/2010. H.O.W -v- Republic Criminal Appeal No. 373/2006,*** the court emphasized that all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. That the trial courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.

In ***Jackson Amwayi N. Republic, CA at Kisumu (2020) eKLR***. The Court stated while noting that a child witness was not cross-examined-

> ***" Another serious infraction is the fact that the appellant does not seem to have been given an opportunity to cross-examination E.K. The record shows that after E.K. gave her evidence in chief, the next witness was called to testify regardless of whether E.K. gave sworn or unsworn evidence, the appellant had the right to cross-examine E.K. and challenge the evidence adduced against him. Failure to accord him this opportunity was prejudicial to him and a violation of his right to fair trial under Article 50(2) (k)."***

Article 50(2)(K) gives an accused person an unfettered right, ***" to adduce and challenge evidence."***

The same situation abides in this case as the trial magistrate proceeded to call the next witness without any indication on the record as to why the complainant was not cross-examined. The appellant was denied the right to challenge the evidence of the key witness who implicated him in this offence.

In ***H.O.W -vs- Republic (2014) eKLR (supra)***. The Court of Appeal stated that failure to give the Appellant an opportunity to cross-examine the minor, fundamentally prejudiced the entire case and the appellant. In the case of **Mutula Wambua -vs- Republic** (supra the court stated that all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. That the trial courts should always observe that requirement of the law in criminal trials.

9. The circumstances in this case falls on all fours in the cases which the Court of Appeal was considering. The appellant was prejudiced as the unchallenged evidence was relied on to convict him. The question is whether a retrial can be ordered.

Fatehali Manji -vs- Republic (1966) E.A 343

> ***" In general a retrial will be ordered only where 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 gaps in its evidence at the first trial, even where a conviction is viated by mistake of the trial court for which the prosecution is not to blame, it does not necessary follow that a re-trial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.".***

The trial was not so to speak a nullity as the appellants conviction could be sustained based on other evidence adduced by the prosecution. Right to fair trial is one of the rights under the constitution which cannot be limited.

Article 25(c) of the Constitution provides:-

> ***"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***
>
> ***(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;***
>
> ***(b) freedom from slavery or servitude;***
>
> ***(c) the right to a fair trial; and***
>
> ***(d) the right to an order of habeas corpus."***

The appellant was convicted in 2017, the offence was alleged to have been committed in the year 2017. The witnesses are from the area of jurisdiction of Wang'uru Court. It will be possible for the witnesses to be traced and for a retrial to be conducted. I am of the view that a retrial should be conducted to accord the appellant the right to fair trial.

In view of the reasons stated, I am constrained to allow the appeal and set aside the conviction.

I order that a retrial be held in the ***Senior Principal Magistrate's Court at Wang'uru*** before a magistrate with competent jurisdiction other than Hon. P.M. Kiama. The appellant be set a liberty from the prison where he is being held and be remanded at Wang'uru Police station from where he will be charged afresh and be presented in court for the plea to be taken.

Signed by:

HON. LADY JUSTICE LUCY GITARI

Dated, signed and delivered at Kerugoya by Hon. Lady Justice J.N. Mulwa this 29th day of October 2020.