REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 51 OF 2017

EDWIN MOMANYI.....APPELLANT

=VRS=

STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. N. Kahara (RM) Keroka Law Courts

dated 14th September 2017 in Keroka Principal Magistrate's Court Criminal Case No. 822 of 2016]

JUDGEMENT

The appellant was tried by the lower court and convicted and sentenced to a fine of Kshs. 40,000/= or two (2) years imprisonment for assault contrary to Section 251 of the Penal Code. The particulars of the charge were that on 13th July 2016 at Ikenye Sub-location in Masaba South Sub-county within Kisii County he unlawfully assaulted Shem Obachi Marindi thereby occasioning him actual bodily harm. Being aggrieved by the conviction and sentence the appellant preferred this appeal. The grounds in the petition of appeal are: -

> **"1. THAT the learned trial magistrate erred in law and infact in convicting the Appellant against the weight of evidence on record.**
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> **2. THAT the learned trial magistrate erred in law in convicting the Appellant on the evidence of a single prosecution witness when he said evidence was not corroborated by any eye witness.**
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> **3. THAT the learned trial magistrate erred in law infact in convicting the Appellant when the treatment notes exhibited in court marked PEXH 2 indicated that the complainant was assaulted by his teachers whilst the Appellant was not one of the said teachers.**
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> **4. THAT the learned trial magistrate erred in law and infact in convicting the Appellant without evaluating the evidence of the Appellant and his two witnesses.**
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> **5. THAT the learned trial magistrate erred in law and infact in convicting the Appellant by basing her findings on conjectures, suppositions and extraneous matters."**

Briefly the prosecution's case was that on 13th July 2016 at about 4pm the complainant, who is described as a minor, was on his way home from school when the accused pulled him away from his friends Jane Nchoka and Wycliff Atambo and started beating him and threatened to kill him if he did not disclose who was pelting the Highway Academy building where he (the appellant) was a teacher with stones. The appellant is said to have thereafter locked the complainant inside a room but people heard his shouts for help and went and rescued him. He was then taken to Gesusu Sub-District Hospital by his mother Frida Nyanchama (Pw2). He was treated and discharged. The matter was then reported to Ramasha Police Station and the complainant was issued with a P3 Form.

Joel Ongaro (Pw3) a Clinical Officer testified that he examined the complainant on 14th July 2016. He stated that the complainant had tenderness on the cheeks and thighs. He approximated the age of the injuries as one day and classified the degree of injury as harm.

In his defence the appellant stated that he was a storekeeper at Kiomiti Highway Academy. He stated that he knew the complainant. He denied that he assaulted the complainant and stated that on the material day and time he was at home. He narrated how he was arrested on 15th July 2016 at 4.30pm and taken to Ramasha Police Station. He contended that the head teacher of D.O.K. Primary School who accompanied the police officers who arrested him had a case with his father in Kisii High Court. He stated that there was a dispute between

the two schools and that the mother was a member of the Board of Kiomiti D.O.K. He called two witnesses Sebastian Anyona Ombati (Dw2) the Head teacher of Kiomiti Highway Academy who stated that on 13th July 2016 at 4pm he was in class teaching when he saw a group of six pupils of Kiomiti D.O.K. Primary school throwing stones towards his school. The pupils he was teaching left to go and see who was throwing stones. He stated that the complainant was one of those pupils but he denied it and also refused to disclose the names of the other boys who were with him. He, Dw2, therefore released him and he went back to teach. He stated that the appellant was not in the school at the time. This was reiterated by David Michira (Dw3) who stated that the appellant had left for the day.

This appeal was canvassed by way of written submissions. I have considered the rival submissions carefully but as the first appellate court I have a duty to re-evaluate the evidence so as to arrive at my own conclusion. I have done so bearing in mind that I did not see or hear the witnesses testifying and unlike the trial court did not have an opportunity to observe their demeanour – **see Okeno Vs. Republic [1972] EA 32.**

It is my finding that the conviction against the appellant cannot stand for two reasons. First, the complainant in this case being a child the trial magistrate should have conducted a voire dire before receiving his evidence to determine whether he understood the nature of an oath and if not to determine whether he was possessed of sufficient intelligence and understood the duty of telling the truth. The record shows that the court acknowledged the complainant was a child as it described him as a minor. The record shows that the minor gave unsworn evidence. The reason for this is not recorded. **Section 19 (1) of the Statutory Declarations Act** makes such examination mandatory for children of tender years. The complainant in this case was 12 years old at the time. In **Samuel Warui Karimi Vs. Republic [2016] eKLR** the Court of Appeal emphasized the need for voire dire and stated: -

> **"Subjecting a witness of tender age to voire dire examination is founded under *Section 125 (1) of the Evidence Act,* which states;**
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> > **"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 or body or mind) or any similar cause".**
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> **[11] Also *Section 19 (1) of the Oaths and Statutory Declarations Act* has something to do with receiving evidence of a child in the following: -**
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> > **"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 is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."**
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> **[12] Both statutes are silent on the definition of who is a child of tender years. In our own understanding of the above provisions of the law voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the Evidence Act, the test if one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."**

The requirement for voire dire is intended to protect the accused's right to a fair trial and that right is compromised by the omission to conduct one. The second reason as to why the conviction cannot stand is the requirement for corroboration by **Section 124 of the Evidence Act**. The Section states: -

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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:"**

There was no other material evidence implicating the appellant. It is also evident from the evidence of the two defence witnesses that the complainant may have been mistaken about the identity of the person who assaulted him. Dw2 told this court that it was him who had an encounter with the complainant and the other children but not the appellant. He stated that the appellant was not in the school at the time. This was confirmed by Dw3 further corroborating the evidence of the appellant. The evidence of the defence witnesses was not controverted and they too impressed me as witnesses of truth.

Whereas there is no doubt the complainant was assaulted, the evidence adduced by the prosecution fell short of the standard required to prove that the appellant was the assailant. This appeal is merited. His conviction is quashed and the sentence is set aside. The fine if already paid shall be refunded but should he be in prison custody he shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered at Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE