



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 93 OF 2017(SOA)

(CORAM: R. E. ABURILI - J.)

GEORGE WILLIAM MUHULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in a judgment delivered on 5/9/2017 at Siaya PM's Court vide Cr. Case No. 707 of 2016, before Hon. T.M. Olando, SRM)

J U D G M E N T

1. The Appellant **George William Muhula** was charged with the offence of Defilement contrary to **Section 8(1) (2) of Sexual Offences Act No. 3 of 2006**. He also faced three Counts of attempted defilement contrary to **Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006**. He was tried, convicted of defilement in count one and sentenced to serve life imprisonment. He was acquitted on the other counts.
2. The Prosecution called 6 witnesses while the appellant testified and called one witness.
3. The trial court after a full trial found the appellant guilty of the offence of defilement and acquitted him on the charges of attempted defilement. He sentenced the appellant to serve life imprisonment.
4. Being dissatisfied with the conviction and sentence meted out on him, the appellant filed this appeal setting out the following grounds of appeal.

1. That: The Learned Trial Magistrate erred in law and fact by failing to find that the medical evidence was insufficient to warrant a sound conviction.

2. That: I cannot recall all that transverse during the trial hence pray for trial court proceedings to adduce more grounds.

3. That: I wish to be present at the hearing of this appeal.

5. At the hearing of the appeal, the appellant also filed supplementary grounds of appeal together with submissions. These were filed by his counsel, Wakla & Co. Advocates. In the supplementary grounds of appeal, the appellant contents that:

1. The Learned Trial Magistrate erred in law and fact in convicting the appellant when the evidence on record was demonstrably insufficient, inconsistencies, doubtful and had glaring gaps hence incapable of sustaining a conviction.

2. The Learned Magistrate erred in law and in fact in failing to find and hold that the prosecution failed to discharge its burden of proof to the required standard and thereby convicted the appellant based on inadequate and discredited evidence.

3. The Learned Magistrate erred in law and fact in failing to appreciate that there was insufficient evidence of penetration.

4. The Learned Magistrate convicted the appellant against the weight of the evidence on record.

5. The Learned Magistrate erred in law and in convicting the appellant on uncorroborated evidence.

6. The Learned Magistrate erred in law and fact in failing to appreciate that there was insufficient evidence linking the accused to the alleged penetration of the complainant in relation to the 1st count.

7. The Learned Magistrate erred in law and fact in failing to find and hold that there was insufficient evidence of recognition and or identity.

8. The Complainant's evidence in relation to the charge convicted was irregularly received without due voire dire examination as contemplated by the law.

6. This being a first appeal, this court is called upon to reexamine and reassess the entire evidence before the trial court and make its own findings and determination bearing in mind the fact that it never heard or saw the witnesses as they testified. This is a principle espoused in **Okeno Vs. Republic [1972] E.A. 32** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (see **Pandya Versus Republic [1957] E.A. 336** and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

7. In **Shantilal M. Ruwala Versus Republic [1957] East Africa 570** it was held that it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions, it must make its own findings and draw its own conclusions, only then can it decide whether the Magistrate's 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 the witnesses. (See **Peters Versus Sunday Post [1958] East Africa 424**.

8. Revisiting the trial court record, **PW1, MA** the complainant testified that on 20/7/2016 they were in the store together with **N, E and B** when the appellant called her and told her to go with him so that he could love her. She stated that the appellant put her on the bed and removed his penis and put it in her and removed it and went and shook it and went and put it on the timber. She stated that at another time he did that to N. She stated that when the appellant noticed P coming, he left the children to go home. She stated that they told Mercy, Molly and mother. PW1 stated that she knew the appellant as **Baba Brayo** and that they live close. In cross examination by the appellant, PW1 stated that she made noise and some people went there including **Atoti** and **Mama Ricky**.

9. **PW2, VA** the complainant's mother, testified that on 20/7/2016 she left home at 11.00 am together with the wife of the appellant and when she went back home at 6.00 pm, she prepared supper and after eating, MA(PW1) told her that when they were at the store, Baba Brian went to the store and told her to go and give him love and that the appellant took her to his bed and defiled her. She stated that she (PW2) made noise and people went and the appellant was asked and he admitted and they went to Siaya Police Station.

10. In cross examination by the appellant, PW2 stated that the children did not make noise since he had threatened to cane them. She stated that the appellant had just moved into the area and as such there was no reason why they would frame him.

11. **PW3, Zakayo Oyoo Otieno** testified that on 20/7/2016 he was in his house at 8.30 when he heard noise from his neighbour's house. He went to that house and he was told that M, PW1 had said that George William had taken her to his house and defiled her and that he had also defiled his daughters CA and E. He stated that they went to the house of the appellant and took him to Siaya Police Station. In cross examination by the appellant, he stated that he heard VA (PW2) making noise that is why he went to her house.

12. **PW4, Patricia Aketch** testified and stated that on 20/7/2016 she left home and went to work and returned home at 6pm and later at about 8pm M(PW1) went and told them that Baba Brian went and removed them from the store and took them to his bed and removed her pant and defiled her and did the same to N and C and E.

13. In cross examination by the appellant she stated that they examined the children and found sperms on them and they took the children to hospital and the appellant to the police station.

14. **PW5** medically examined all the three complainants in the three counts and produced their treatment notes and P.3 forms as exhibits. He stated that at the time of examination, MA PW1 had bruises at the labia minora and that the hymen was absent with foul smelly discharge from the vagina. He concluded that there was forceful vaginal penetration of the child. On examination of E.A. (not a witness), he found that there were no bruises or tear noted and the laboratory test results were negative. He also produced the medical report for CA (Not a witness).He stated that her genitalia were normal and hymen was intact and there were no bruises.

15. **PW5** produced the medical report for MA (PW1) and stated that on examination she had inflamed labia minora but there were no bruises nor laceration. He stated that she had foul smelly vaginal discharge and on laboratory examination there were epithelial cells noted and there were no spermatozoa. He also produced the P.3 forms for the accused who he stated was treated at the hospital. In cross examination by the appellant, he stated that MA (PW1) was not stitched as she only had bruises.

16. **PW6, CPL Catherine Nziza Mutisia** testified that on 21/7/2016 at around 10.00 am, she was in the Crime Office when she received the complainants who were in company of their parents. She stated that they all alleged to have been defiled by a person known to them as George who was their neighbour. She stated that she visited the scene together with the other officers and that the suspect was taken to the station by members of the public and she took the appellant to hospital and she later charged him with the offence.

17. On being placed on his defence, the appellant testified and denied committing the offence. He stated that he left home at 11.30 am and went to Siaya where he stayed up to 5.00 pm when he returned home and after his wife prepared the food and at 8.00 pm, he heard some noise and when he went to see what it was, he was told that there was nothing. That at 10.00 pm he was called by his neighbour who asked him to go out and when he went out he was assaulted by the mob who tied and escorted him to the police station. He denied having seen the children on the material day.

18. **DW2 Rose Adhiambo** testified for the appellant and stated that she was the wife to the appellant. She stated that on 20/7/2016 at 11.00am she left and went to church with V (PW2) and returned home at 6.00pm and found her husband William in the house and later at 10.00 pm she heard some people talking and someone called 'father' went and knocked her door and called the appellant outside and when

they went out they found people around who took the appellant away.

19. She stated that when she returned from church, she found the children complainants and that she sent them to the shop. She also stated that she left the accused /appellant in the house when she went to church and when she went back to the house, she found the appellant /accused at home.

20. In his determination, the trial court found it difficult to believe the evidence of the appellant that he did not see the children the whole day, yet DW2 his wife testified that she sent the said children to the shop and they went to her house to deliver what they were sent hence either the wife or the appellant was lying and thus found the defence to be untrustworthy and disregarded it.

21. The trial court also found that the complainants in the second and third counts did not give evidence and that there was no sufficient evidence to warrant a conviction of the appellant hence he acquitted him on the second and third counts.

SUBMISSIONS

22. In the written submissions filed on his behalf by Wakla & Co. Advocates, the appellants contended:

(i) Inconsistency of Evidence at Trial

23. According to the appellant, the Prosecution's evidence was deflowered by repugnancies during trial, which were not discounted by any reasonable facts. Counsel gave an example of PW4 upon cross examination by the accused, claiming that upon examining the children at night they found sperms on them (pg 15 line 8 of the record of appeal). In his view, it was not clear who she was referring to because no other witness gave evidence of the presence of the sperms in any of the complainants. He maintained that this evidence contradicted the testimony of the medical expert PW5, who throughout his testimony did not give any evidence of the presence of sperms (pg. 16 lines 31 & 32, pg. 17 lines 7,8,15, 16 of the record of appeal). He further submitted that PW5 directly stated that there was no spermatozoa (pg. 17 line 17 of the record of appeal).

24. Further submission was that a medical examination was conducted on the appellant and the laboratory tests revealed that he was suffering from syphilis which is a sexually transmitted disease (pg 17 line 28 of the record of appeal). He argued that if indeed the appellant had defiled the complainant how, come her test for Syphilis was negative? (pg. 16 line 22 of the record of appeal).

25. Counsel submitted that PW1 upon cross examination stated that she made noise which Atoti and Mama Ricky responded to (pg.11 lines 31 & 32 of the record of appeal), which contradicted the evidence of PW2 who on cross examination stated that the children did not make noise as the appellant threatened to cane them if they made any noise (pg.12 lines 31&32 of the record of appeal).

26. It was submitted that although the trial court took the foregoing facts into account in its judgment but went ahead to convict the appellant (pg. 22 line 20, 27 & 28).

(ii) Insufficient Evidence of penetration.

27. The appellant's counsel submitted under this heading and stated that the Prosecution did not prove penetration which is a key ingredient in the offence of defilement during trial. He referred to the testimony of PW5 to the effect that upon medical examination of the Appellant, he was found to have had a wet prepuce with no bruises or lacerations (pg. 17 line 26 of the record of appeal). This, according to the appellant's counsel, was unusual, taking into account both the age of the Appellant and the Complainant. That if indeed the Appellant had defiled the Complainant, there is no way his penis would have come out of the Complainant's vagina without bruises or lacerations.

28. The appellant's counsel further submitted that PW5 in his testimony talked about a blood stained pant of PW1 during her medical examination (pg. 16 line 19 of the record of appeal). However, it is was submitted that it was not clear from his testimony whose blood was contained on the pant or whether it was sent to the Government Chemist for further analysis. Further, he attacked the non-production of the said pant as an exhibit for the prosecution.

(iii) Uncorroborated evidence

29. It was further submitted that PW1 in her testimony stated that she was with Nicole, Eveline and Bella when the "alleged" defilement took place and they witnessed the incident (pg. 11 line 20, 23). Counsel wondered why the 3 children were not called as witnesses. He submitted that the prosecution's hesitance to call them as witnesses during trial should appeal to this court to draw a negative inference.

30. It was further submitted that PW1 also mentions that she made noise, to which "Atoti and Mama Ricky" responded to (pg. 11 line 31 & 32). However, that neither of the two was called as a witness, therefore this court should infer negatively that had the said witnesses been called, they would have given adverse evidence to the prosecution's case since these were star witnesses, who would have been the first people to visit the crime scene.

(iv) Voire Dire examination

31. The appellant's counsel further submitted that before taking the testimony of PW1, the trial court failed to take into account if the Complainant could tell the difference between truth and falsehood. That no *vire dire* examination was carried out on her yet she was a child of tender years.

32. On the law, counsel submitted that there was no corroboration and that failure to carry out a *voir dire* examination on the complainant was fatal to the prosecution's case. Reliance was placed on **JOHNSON MUIRURI v REPUBLIC [1986] KLR 447** where the Court of Appeal stated:

“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.”

33. Further reliance was placed on *Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported)* where the same Court stated:

“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 voir 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 in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking 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 (Section 19, Oaths and Statutory Declarations Act, Cap 15. The Evidence Act (Section 124 124, 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.”

34. Counsel also relied on *Oloo s/o Gai v R [1960] EA 86* and *Gabriel s/o Maholi v R [1960] EA p159* where the Court of Appeal for Eastern Africa held that it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath; since the judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand. Further reliance was placed on Kibangeny *Arap Kolil [1959] EA 92* on the importance of subjecting the evidence of children of tender years to *voir dire* examination to establish whether they were telling the truth and the need to observe the provisions of section 19 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya.

35. Counsel concluded by urging this court to find that the prosecution did not prove the charge of defilement against the appellant as charged and acquit him of the offence and set him at liberty.

36. The prosecution represented by Mr. Okachi Senior Principal Prosecution Counsel opposed the appeal herein and submitted, maintaining that the prosecution established all the elements of defilement against the appellant beyond reasonable doubt and that therefore the trial court was correct in its findings. On sentence, counsel submitted that it was lawful considering mitigation and the age of the complainant in count one. In his view, *voir dire* was conducted on PW1. He urged the court to dismiss the appeal.

DETERMINATION

37. I have carefully considered the appellant's appeal, the grounds thereof, the supplementary grounds of appeal, submissions and authorities relied on. I have reassessed the evidence before the trial court and the opposition by the Respondent's counsel. In my humble view, the issues for determination can be easily be drawn from the submissions filed by the appellant's counsel namely:

(i) Whether the prosecution's evidence was riddled with material contradictions and inconsistencies

38. According to the appellant's counsel, the prosecution's evidence was deflowered by repugnancies during the trial. Counsel gave an example of PW4's evidence in cross examination by the appellant wherein she claimed that upon examining the children at night they found sperms on them.

39. The appellant's counsel contended that it is not clear whom she is referring to because no other witness gives evidence of the presence of the sperms in any of the complainants. Further, that the aforesaid evidence of PW4 contradicts the testimony of PW5, the medical expert who did not give evidence of the presence of sperms [no spermatozoa].

40. It was further submitted that the medical examination on the appellant showed that he was suffering from syphilis and that if that was the case then how could the complainant who had been defiled by the appellant test negative for syphilis. It was further contended that whereas PW1 stated in cross examination that she made noise which attracted Atoti and Mama Ricky to the contrary, PW2 in cross examination stated that the children did not make noise as the appellant threatened to cane them if they made any noise.

41. The appellant's counsel submitted that although the trial court took into account the above facts, he nonetheless went ahead to convict the appellant.

42. The questions therefore, that I must resolve from the above submissions are whether the prosecution evidence as aforesaid was inconsistent and contradictory and if so, whether the alleged inconsistencies and contradictions are material as to render the appellant's conviction unsafe and unsustainable.

43. I have re-examined the evidence of PW1 and PW2. PW1 is a minor who gave very brief testimony concerning the incident which she claimed happened during the day on 20/7/2016 when the appellant called her where she was in the company of 2 other children and he told her to go with him so that he could love her. He then put her on his bed, removed his *dudu* (penis) and put it in her vagina and shook. He then went and put it on the timber. That the Appellant noticed Patty coming and he left the children to go home. The children went and told Mercy, Molly and Mother.

44. PW1 called the appellant as Baba Bryan, a person she knew well because he lived close to them. In cross examination, PW1 stated that she made noise and some people went to where the incident was happening. They were- Atoti and Mama Ricky. On the part of PW2, she stated in cross examination that the children did not make noise since they said the Appellant threatened to cane them.
45. It is true that there is some inconsistency in the answers in cross examination of PW1 a child aged 6 years and PW2 her mother on whether PW1 made noise which attracted Atoti and Mama Ricky, or whether the appellant threatened the children that he would cane them if they made noise.
46. From the above evidence in cross examination, it is clear that PW2 was testifying on what she had been told by PW1, the child whereas PW1 was testifying on what she had experienced on the material day. The trial court believed that what PW1 was telling the court was the truth. He however did not address that inconsistency in the evidence.
47. I have considered the evidence of PW1 and PW2 as a whole as stated above, and the inconsistency therein. I find that albeit there was inconsistency as to whether the children made noise that attracted Atoti and Mama Ricky, or that the children feared making noise because the appellant threatened to cane them, that inconsistency is too minor and immaterial to the prosecution case and evidence as a whole such that it would not vitiate the Appellant's conviction.
48. I say so because the bottom line in the case was whether or not the appellant committed the offence and on this the evidence of PW1 as supported by Medical evidence of PW5 was clear that the complainant PW1 was defiled. PW1 was clear that she was defiled during daytime at about 11.00 am and that she identified and recognized the defiler appellant herein as Baba Bryan whom she knew very well as he lived near her home.
49. On the other alleged inconsistency that PW2 testified in cross examination and stated that upon examining the children at night they found sperms on the minors, contrary to what PW5 stated that there was no spermatozoa on the complainant, I have examined the testimony of PW2 in chief and in cross examination she stated as follows, **".....upon examination it was found that Mhad been defiled. She was given medication and we went back the following day. The child had injuries on her private parts, vagina. She did not have blood but there were brownish discharge."**
50. In the above evidence of PW2, there is no mention that PW2 examined the child or children at night and found her /them to have sperms on them.
51. In addition, the cross examination answers given were in response to the questions put to PW2 by the appellant and there is no indication from those answers to suggest that when PW2 examined the children at night, she found sperms on them. This court cannot assume that brownish discharge is the same as spermatozoa.
52. Further, it is not in every case of defilement that sperms are released by the defiler. Furthermore, PW4 stated that when she examined her child E., the child had whitish things on her private parts. Similarly, this court cannot assume that whitish things are scientifically speaking, sperms. The appellant was acquitted on the count of defiling E., as E did not give evidence and therefore an argument touching on this complainant cannot hold for purposes of this appeal.
53. In other words, there is no scientific evidence to suggest that the whitish or brownish substances seen by PW4 on the children were sperms, as PW5 testified that he did not see any sperms. PW4 was testifying on what she had seen and not on what was later found by PW5. PW5 as a medical expert was in a better position to tell whether the white or brown substances were merely discharges or sperms.
54. PW5 testified that when he examined PW1 that night of 20/7/2016 he found that she had blood stained pant, bruises at labia minora and hymen was absent. There was foul smelly discharge from the vagina. High vaginal swabs showed blood stains. Urinalysis showed yeast. Examination on the 2nd and 3rd complainants showed no defilement whereas the 4th complainant had inflamed labia minora and had smelly foul vaginal discharge with pathelial cells but no spermatozoa.
55. As I have stated above, the fact that PW4 stated that the children had sperms on them which PW5 stated was the opposite does not render the evidence of the prosecution witnesses contradictory and therefore worthless. As to what qualified to be called spermatozoa could only be stated by a medical expert, PW5 and not PW4 or PW2 who only viewed the children and saw some substances on them.
56. The appellant's counsel also submitted that there was no way the appellant who was found to be suffering from syphilis could have defiled the minor yet the minor on being examined had no syphilis.
57. The question is whether in every case where an alleged defiler is suffering from syphilis or even worse still, HIV/AIDS, then their victim must on examination be found to have been infected with the same disease.
58. In defilement cases, there is no requirement that the defiler must infect the victim with the disease that he suffers from at the time of defilement. In this case, the evidence of PW1 that she was defiled was confirmed by PW5 that on examination he found the inflamed labia minora and with a smelly foul vaginal discharge with epithelial cells. In my view, this evidence, in the absence of any other contrary evidence, was sufficient to establish that the child was defiled.
59. **On whether there was sufficient evidence of penetration**, PW1 narrated to court how the appellant put her on the bed, removed his penis and inserted it into her vagina then he took it out and went and shook it and placed it on the timber.
60. PW5 who medically examined the complainant and produced her treatment notes and P.3 form as exhibits stated that on examining PW1, he found that she had bruises at the labia minora and that the hymen was absent, with foul smelly discharge from the vagina. He

concluded that there was forceful vaginal penetration of the child. He stated that she had foul smelly vaginal discharge and on laboratory examination there were epithelial cells noted and there were no spermatozoa. On being cross examined by the appellant, PW5 stated that MA (PW1) was not stitched as she only had bruises.

61. The above evidence in my view was sufficient enough to establish penetration as defined in section 2 of the Sexual Offences Act. The allegation that there is no way the appellant's penis could have come out of the vagina of the minor complainant without leaving behind bruises and lacerations is unfounded. The Clinical Officer was clear that there were bruises but no lacerations.

62. ***On whether there was sufficient evidence against the appellant to warrant his conviction***, the evidence of PW1 and her narration to her mother, PW2, was that she was defiled during the day and that, that person was well known to the victim as she described him as a person who lives near them and his name is Baba Bryan. The child described how the appellant put his "**dudu**" penis in her vagina, shook and went and put it on the timber and that when he noticed the victim's playmate Patty, he left and the children went and reported the incident to PW2. That evidence alone proves beyond reasonable doubt that the child was defiled by a known person and not a stranger. This evidence was supported or corroborated by the evidence of PW5 who confirmed that the child was defiled. PW2 confirmed that the appellant was well known by the child as they were neighbours and that on that day PW2 was, in fact, with the appellant's wife.

63. I am satisfied that the prosecution discharged the burden of proof required beyond reasonable doubt that PW1 was defiled and defiled by the appellant. I find no mistaken identity of the person of the appellant.

(ii) Whether failure to carry out voire dire examination on a minor child was fatal to the prosecution's case. On whether failure to carry out ***voire dire*** examination of the child to determine whether she understood the importance of telling the truth was fatal to the Prosecution's case, I have re-examined the trial court record and I have established that ***voire dire*** examination was conducted on PW1 a minor before the trial court concluded that "***the witness is competent. She will give unsworn evidence.***" The trial magistrate also allowed the appellant to cross examine her.

64. In addition, in assessing the credibility of PW1, the trial court stated that "***the child's evidence was so consistent and unshaken and I find no reasons as to why the child could frame the accused with such an offence.***" Further, that the accused said he was new in the area and so there was no basis for framing him.

65. In ***Gabriel Maholi v. R [1960] EA 159*** the court stated:

"... Even in the absence of express statutory provision, it is always the duty of the court to ascertain the competence of a child to give evidence. It is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also, that the child understands the difference between truth and falsehood."

66. Indeed, the law requires that before taking the evidence of the child, courts must acknowledge the intelligence of the child and therefore apply the correct standard of proof so as their conclusion can be fully justified by evidence. In ***Oloo Gai v. R12 12 [1960] EA 86***, where the judge failed to direct himself and assessors on the dangers of relying on uncorroborated evidence of a child of tender years and had overlooked significant items of evidence bearing on reliability of child's story, the Court stated that the conviction cannot stand on the basis as follows:

"... It would have been better for the trial judge to record in items that he had satisfied that a child understands the nature of oath..."

It should be drawn once again that judicial officers are required by evidence laws to ascertain the validity and viability of evidence from children of tender age.

67. In ***Joseph v. R13 13 [1971] HCD No. 58*** Onyiuke, J stated that:

"... It is a condition of the reception of such evidence that the trial magistrate must not only be satisfied that the child understands the duty of speaking the truth, but that he must manifestly appear to be so satisfied because s.127(2) of Evidence Act, 1967 requires him to record such fact in the proceedings"

68. In ***Johnson Muiruri vs Republic [1983] KLR 445*** the Court of Appeal stated:

"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 in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking 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.

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.

When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

69. The Appellant alleges that the evidence of PW1 who was a minor in support of the prosecution case was given without a *voire dire* examination contrary to the mandatory provisions of the law which Section 19 of the Oaths and Statutory Declarations Act which provides:

"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 on oath, if in the opinion of the court or such a 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 in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."

70. In *Julius Kiunga M'rithia vs. Republic*, [2011] eKLR, the court held:

"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about -

(1) Whether the child understands the nature of an oath; or

(2) If the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

71. The procedure for conducting a *voire dire* examination was stated in *Francisco Matove vs. Regina* [1961] E.A to be (1) *the trial magistrate should question the child to ascertain whether the child understands the nature of the oath, and (2) if the court does not allow the child to be sworn, it should record whether or not, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.*

72. The consequences of non-compliance with section 19 of the Oaths and Statutory Declarations Act was articulated by the Court of Appeal in *Samuel Warui Karimi v Republic* [2016] eKLR that:

"...we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness."

73. In *Maripett Loonkomok v Republic* [2016] eKLR a different bench of the Court of Appeal was of a different view of the effect of non-compliance with the said section and held as follows:

"It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found 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." See *Athumani Ali Mwinayi v R Cr. Appeal No.11 of 2015.**

On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voire dire examination. The complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."

74. From the above Court of Appeal decisions, it is apparent that while the evidence of a witness of tender years who is not subjected to a *voire dire* examination is not dependable evidence, the other evidence adduced in a criminal trial can still be relied upon to determine the guilt or otherwise of an accused person. In this case as I have stated, there was *voire dire* examination on PW1 and the trial court found the child to be truthful in her testimony against the appellant.

75. Accordingly, I find and hold that failure to conduct *voire dire* examination in the manner stipulated in *Johnson Milimu v Republic* [1983] KLR 447 and *Kiveveto Mboloi Vs. Republic* [2013]eKLR as submitted by the appellant's counsel was not fatal to the Prosecution's case as the trial court believed that the child was telling the truth and there was nothing to show that she could have been couched to frame the appellant with such an offence.

76. I further find that there was independent medical evidence of PW5 which was sufficient to prove penetration of the vagina of PW1 as stipulated in **Section 2 of the Sexual Offences Act**, and that excluding the evidence of PW1 a child of tender years who had given a narration of what had happened to her to PW2 her mother would not vitiate the conviction of the appellant.

(iii) On whether failure to subject the blood of the complainant to DNA test for corroboration and or whether failure to produce the complainant's pant was fatal to the prosecution's case

77. The appellant claimed that the blood found on the complainant was not subjected to DNA testing to determine whether it belonged to the appellant and that failure to do so was fatal to the prosecution's case. My finding and holding is that there was conclusive medical evidence that the complainant was defiled and therefore the appellant's allegation that there was no forensic evidence to prove that the substance found on the complainant was linked to the appellant is devoid of merit as forensic evidence was not necessary in the circumstances of this case. **Section 36 (1) of the Sexual Offences Act** stipulates:-

"36. (1). Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the Court may direct that an appropriate sample or samples be taken from the Accused person, at such place and subject to such condition as the court may direct for the purpose of forensic and other testing, including a DNA test, in order to gather evidence and to ascertain whether or not the Accused person committed an offence."

78. The Court of Appeal in **Robert Mutungi Mumbi V. R Cr. App. No. 52/2014 (Malindi)** and **Williamson Sowa Mwanga V. R Cr. App. No. 109/2014 (Malindi)** considered the above provisions and stated in the **Robert Mutungi Mumbi v R appeal**:

"Section 36 (1) of the Act empowers the Court to direct a Person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

79. In the latter case of **Williamson Sowa Mwanga** [supra] the Court of Appeal stated:

" It is patently clear to us that whilst paternity of PM's child may prove that the father of the father of the child had defiled PM. that is not the only evidence by which defilement of PM. can be proved. The fact, as happens in many cases that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the Appellant would at not determine whether he was father of PM's child, which is a different question from whether the Appellant had defiled PM. As the court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ by the male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be ruptured. (See Twehangare Alfred V. Uganda CR. APP No. 139 of 2001." It is partly for this reason that Section 36(1) of the sexual offence Act is couched in permissive rather than mandatory terms, allowing the Court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence to order that samples be taken from him for forensic, scientific or DNA testing."

80. In **AML v Republic [2012] eKLR** the court held:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

81. The above position was taken in the earlier case of **Kassim Ali v Republic, [2006] eKLR** that:

"The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim or by circumstantial evidence."

82. Similarly in **Benjamin Mbugua Gitau v Republic** the court stated that **there was no necessity of DNA test as penetration which is the main element of the offence was proved.**[emphasis mine].

83. In addition, the fact that a victim was not a virgin or that their hymen had long been broken does not absolve an accused person of the crime he committed. See **Mohamed v Republic [2006] 2 KLR 138** where the court stated:

"It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

84. With the above decisions, I find and hold that there was no necessity in the instant case for the trial court to require DNA test to establish whether the appellant is the one who defiled the complainant as there was sufficient evidence that he had defiled the minor. I reiterate that with or without such corroborative DNA evidence would not have made the appellant's defence any better as there was overwhelming credible evidence that he was the person positively identified to have defiled the minor PW1.

85. I hasten to add that there is no mandatory legal requirement that the blood or substances found on the child's genitals be taken for forensic examination to determine whether it was the appellant who defiled the child. Further, failure to produce the complainant's pants which were stained with blood was not fatal to the prosecution's case.

86. ***On failure to call the other three children as witnesses***, the appellant complained that failure to call the 3 children who are said to have been in the company of the appellant on the material day as witnesses was prejudicial and therefore fatal to the prosecution's case. However this court on the evidence adduced finds that there is nothing to demonstrate that the said children were eyewitnesses to the defilement of the complainant herein PW1 or that their evidence was so crucial that had they testified, they would have given evidence that would have aided the accused person's case or that as a result of the failure to call them as witnesses, then the court should have made an adverse inference that the evidence they would have adduced would have been adverse to the prosecution's case.

87. In my view, the failure to call the three children as witnesses was not prejudicial or fatal to the prosecution's case as the trial court which had the opportunity to hear and see the complainant give evidence believed that she was telling the truth coupled with medical evidence which proved penetration.

88. The evidence adduced as a whole was, in my view, sufficient to warrant a conviction of the appellant with the offence charged. PW1 was clear that when the Appellant saw the other children come, he took off. Meaning, the other children did not see PW1 being defiled. The appellant was well known to the complainant child who positively recognized him as her defiler and as the offence took place in broad daylight. There is no material to suggest that the appellant was framed with the offence. Furthermore, the appellant was acquitted of the charges where the other children were complainants because they were never brought to court to give evidence against him. Accordingly, the argument fails.

89. ***On whether the age of the complainant was proved***, I find and hold that the prosecution proved by way of a birth certificate of the minor that she was 7 years old and therefore a child as defined under section 2 of the Children's Act. PW1 in her unsworn testimony stated that she was a pupil in class 4 at K. Primary School. Her mother PW2 testified that PW1 was born on 23rd September 2012. Her birth certificate produced as exhibit shows that she was born on 15/6/2009. She was therefore a child aged 7 years as at 20th July 2016 when she was defiled.

90. ***In the end, I find and hold the Prosecution proved its case against the appellant beyond reasonable doubt. The conviction was sound. I uphold it and dismiss the appeal against conviction.***

91. On sentence, the appellant was sentenced to serve life imprisonment as stipulated in section 8(2) of the Sexual Offences Act, which sentence is minimum and mandatory. However, on the strength of ***Francis Muruatetu case and CA CRA No. 93 of 2014 Jared Koita Injiri [2019] e KLR*** at Kisumu, I find it necessary to give the appellant an opportunity to mitigate for resentencing purposes. Resentencing shall be done after such mitigation and after this court has received a social inquiry report from the Siaya County Probation Officer.

Dated signed and Delivered at Siaya 29th Day of October, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Ochanyo Counsel for the appellant

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent/State

Appellant present

CA: Brenda and Modestar