REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 113 OF 2014

MUSEMBI MAKAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable C A Ocharo- PM

dated 3rd November, 2017 in Machakos Chief Magistrate's

Criminal Case No. 1946 of 2014)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

MUSEMBI MAKAU.....ACCUSED

JUDGEMENT

1. The appellant, **Musembi Makau**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No. 1946 of 2014 Criminal Case No. 1076 of 2013 with two counts. The first count was that of defilement contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act. No. 3 of 2006*** the particulars being that on diverse dates between 8/12/2014 and 10/12/2014 in [Particulars Withheld] sub location in Kathiani sub county within Machakos County the appellant intentionally caused his penis to penetrate the anus of **KM**, a child aged 10 years. In the alternative he was also charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the particulars being that during the said period at the same place he touched the anus of the same child with his penis. In count II he faced the charge of abducting in order to subject to grievous harm contrary to section 260 of the Penal Code in that on the 8/12/2014 at [Particulars Withheld] sub location within Kathiani sub county, Machakos County, the appellant kidnapped KM in order that the said KM may be subjected to grievous harm knowing it to be likely the said KM will be so subjected.

2. After hearing the evidence, the learned trial magistrate found the appellant guilty in the said two main counts and convicted him accordingly. She proceeded to sentence the appellant to life imprisonment which she stated was the mandatory sentence in count I and to 5 years in count II both sentences running concurrently.

3. In order to prove its case, the prosecution called 4 witnesses. According to PW1, on 8th December, 2014 she had gone to the *shamba* and when she returned she found the complainant, her son not at home. Upon inquiring from the other children where he was, the other children did not know. Upon the return of her husband, she informed him of the complainant's disappearance and they searched for him for three days. On 10th December, 2014 her brother, **Nzivo**, called her husband and relayed the information to him that the complainant was found at a place called [Particulars Withheld] and had been taken to PW1's father's home. Upon proceeding there, she found that the complainant had already been taken to Kathiani Police Station where she proceeded to and found the said **Nzivo** and the complainant recording their statements. The complainant then informed her that the appellant got hold of him from Kwa Mulinge bridge. According to PW1, when she examined the complainant she did not notice anything though the doctor informed her that he had been defiled.

4. PW2, the complainant testified that he was 10 years old. While he stated that one who tells the truth goes to God, he stated that he did not understand what it means to take oath. However, the court found that he was very intelligent and appreciated the truth and understood about God and was accordingly sworn.

5. According to him, sometimes in the middle of 2014, he was at Kyaoni Bridge on his way to his maternal grandparents' home in Kathiani alone at about 10.00 am when the appellant whom he did not know before appeared and called him. According to him the appellant wanted to show him what he will give to the complainant's mother. The complainant followed him to his house where the appellant locked him inside and then left. At night the appellant took to him bread and then he slept on the same bed as the appellant. According to him, he slept in his clothes while the appellant slept naked. According to him, the appellant touched his buttocks using the appellant's private parts. To the complainant the appellant used his tail which he inserted in the complainant's buttocks and the complainant felt pain and screamed but no one heard the screams. The complainant stayed there for four days together with the appellant during which period the appellant would cover his mouth and insert his tail into his buttocks. He testified that when the wall of the house collapsed he saw light and screamed. His screams attracted **Nzivo** who was coming from the *shamba* and when the appellant saw him he took off and **Nzivo** ran after him followed by the complainant and the appellant was caught at the complainant's grandmother's home. The complainant then narrated to **Nzivo** what the appellant had done to him and though the appellant denied, he was taken to Kathiani Police Station where the complainant narrated what had happened to him. After that he was taken to the hospital in the company of his father and the said **Nzivo** where he was joined by his mother. At the hospital he was examined and treated. He identified the person who abducted him as the appellant but said that he did not know him prior to that day.

6. PW3, **Dr Agatha Kasina**, examined the complainant and found that the muscles of his anal opening were weakened. There were old tears showing previous defilement. She concluded that the complainant had been defiled and filled the P3 form which she exhibited. According to her the appellant was also taken to the hospital the same day. According to her she examined the appellant though she was not aware where the documents were.

7. PW4 testified that upon realising that the file had been minuted to him for investigations, he summoned witnesses who recorded their statements. He then sent them to Kathiani Sub-County Hospital where a P3 form was filled and the age assessment revealed that the complainant was below 18 years. After investigations he charged the appellant with the offence before court.

8. Upon being placed on his defence, the appellant testified that he was a preacher before his arrest. On the day in question, he was preaching in Marikiti at Machakos till 3.00pm when he went back home. Since he was constructing his house he found the person who were digging the posts and paid him the money for the women who were fetching water. The said person informed him that PW1 was looking for him claiming that he had abducted her son. He then proceeded to PW1's house where he found the complainant's parents and informed them that he had not seen the complainant. The following day he learnt that the complainant had gone to his aunt. However, the parents told him to say that he was with the appellant because the appellant had not given them the job of fetching water. According to him the charges against him were fabricated since he does not sleep with children. According to him the motive behind the charges was to stop him from constructing him home by his step-brother.

9. In her judgement, the learned trial magistrate found that that based on the age assessment report and the complainant's own evidence, the complainant was a child. She also found that based on the medical evidence there was penetration. She also found that based on the complainant's evidence the accused committed the offence. She also found that the appellant deceived the complainant to go into his house with the intention of causing harm to the complainant.

Determination

10. I have considered the evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

11. The first issue taken by the appellant is that the trial proceeded in contravention of the provisions of Article 50 of the Constitution. Article 50(2)(c) and (j) of the Constitution provides as hereunder:

> **(2) Every accused person has the right to a fair trial, which includes the right—**
>
> **(c) to have adequate time and facilities to prepare a defence;**
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> **(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;**

12. It is therefore clear that the appellant was entitled to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence. In **Dennis Edmond Apaa & Others vs. Ethics & Anti Corruption Commission [2012] eKLR** the court had this to say on the same: -

> **"The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure if made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be update when additional information was received."**

13. In **R vs. Ward [1993] 2 All ER 557**, **Glidewell, Nolan and Steyn, LJJ** held that:-

> **"The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."**

14. However, as was held by the Court of Appeal in **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR**:

> **"The record indicates that the appellants were availed all the statements of the prosecution witnesses before those witnesses testified. They also had access to the exhibits that were produced. What we understand the appellants to complain about is that they were not availed the intelligence report that led to their arrest for suspicion of involvement in terrorism acts. Our reading of Article 50(2) (j) of the Constitution does not grant the appellants the blanket right to access all the information in possession of the police including intelligence reports. What the appellants were entitled to was the evidence that the police intended to rely on at the trial, and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence. Indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case. In *Bakari Rashid v. Republic [2016] eKLR*, this Court refused to fault the prosecution for failure to produce police informers as witnesses. It stated thus:**
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> **"Police officers and crime-busters, most of the time use informers to gather information regarding crime. The informers are normally secretive as they go about their business and to open them up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses."**
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> **We are therefore satisfied that the appellants' right to fair trail under Article 50(2)(j) was not violated because all the evidence that the prosecution produced in support of its case was availed in advance to the appellants."**

15. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront. That is my understanding of the decision of the Court of Appeal in **Simon Githaka Malombe vs. Republic [2015] eKLR,** where the said Court expressed itself as follows:

> **"We do not quite fathom how the appellant can possibly be to blame for the prosecution's failure to supply the witnesses' statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal…It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real."**

16. In this case, the record does not indicate at all that the learned trial magistrate inquired as to whether this imperative constitutional command had been adhered to. The duty and obligation to conduct a fair trial rests on the court and therefore it is imperative that the court ensures that the provisions of Article 50 of the Constitution are adhered to at all stages of the trial. Failure to do so may well render an otherwise properly conducted trial fatal. As stated in **Simon Githaka Malombe vs. Republic** (supra) an accused person, particularly where, as in this case, he is acting in person and is in custody, is not to blame for not having money to photocopy the statements and documentary evidence as to do so would amount to stigmatization and even criminalization of poverty or inability to pay for statements. Since it is the prosecution that assembles and retains custody of evidence against an accused person, the duty of disclosure lies with the prosecution and not with the court and in the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Where therefore an accused person indicates inability to make copies, the duty must lie with the State, as represented in criminal trial by the prosecutor, to avail the copies at State's expense. Therefore, it is for that Office to make proper budgetary allocation for that item. Since under Article 48 of the Constitution, it is the State's obligation to ensure access to justice for all persons, only by facilitating the accused persons to get statements and documentary evidence can the constitutional guarantees in said Article and in Article 50(2)(c) and (j) be real.

17. The Appellant also took issue with the manner in which the evidence of the complainant was taken, the complainant being a child of tender years. In The Court of Appeal gave its guidance on the issue of *voir dire* examination in **Johnson Muiruri vs. Republic [1983] KLR 447** at pages 448-450 as follows:-

> **"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.**

In Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported) we said:

> **"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if 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, 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."

A similar opinion was expressed by the Court of Appeal in England recently in *Regina v Campell* (Times, December 10, 1982):

> **"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.**

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in *R v Lal Khan* [1981] 73 Cr App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen....

There Lord Justice Bridge said:

> **'The important consideration... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.'**

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life."

It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in *Oloo s/o Gai v R* [1960] EA 86 the Court of Appeal said 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.

In *Gabriel s/o Maholi v R* [1960] EA p 159, again our former Court of Appeal said that 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 the truth and falsehood.

In *Kibangeny Arap Kolil* [1959] EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial judge to warn himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal."

18. In this case the complainant stated that he knew that telling the truth is good, one goes to God. He also knew about the bible, God and Satan. He however stated that he did not really understand the meaning of taking oath. In her finding the learned trial magistrate stated that the complainant was very intelligent and appreciated the truth and understood about God. However, as stated above, when a court has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct. What the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if 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. In other words, it is not enough that the child understands the importance of telling the truth. He must also have appreciated the solemnity of the occasion and what the taking of the oath entails. In this case I am not satisfied that the two conditions precedent necessary for swearing the complainant were fulfilled.

19. However, as was held by Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR**:

> **"We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the**

peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014. Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. Voir dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary. But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; ".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence" (our emphasis)

Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006. It is clear to us from the record that the trial Magistrate deliberately did not conduct voir dire examination for he believed, erroneously, that the complainant was not a child of tender years. The record reads thus;

"PW1 F/c (Female child) not of tender years sworn states in Kiswahili." The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir 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 case where voir 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 Mwinyi 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 voir 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."

20. While the taking of the complainant's evidence on oath was not necessarily fatal, it is my view that his evidence required corroboration. On the issue of whether the evidence of a minor requires corroboration, the law is quite clear: it does. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, 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." [Emphasis added]

21. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** this Court held that:

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

22. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

> **"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:**
>
> **"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."**
>
> **The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."**

23. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

> **"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."**

24. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

> **"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."**

25. In this case the certified copy of the judgement on record states at page 5 thereof that:

> **"I am not convinced beyond reasonable doubt that the child was telling the truth.''**

26. In this case the appellant was not known to the complainant before the commission of the offence. The person who found the complainant in the appellant's house, an uncle to the complainant was for some unknown reasons not called to testify. A reading of the record also reveals that on occasions the complainant was found not to be of sound mind. Though at one point the court called for a report, even subsequently it was reported that the appellant was mentally disturbed. Article 50(2)(h) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

27. In **Macharia vs. Republic HCCRA 12 of 2012 [2014] eKLR** which was considered and cited with approval by the court in the case of **Joseph Ndungu Kagiri vs. Republic [2016] eKLR** which it was stated as follows:

> **"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal**

representation at state expense."

28. In this case, since the proceedings reveal some doubt as regarding the appellant's appreciation of the charges facing him, that factor in my view constituted a ground for possible substantial injustice resulting and at least the appellant ought to have been asked whether in those circumstances he required services of legal counsel.

29. In these circumstances it is my view that the possibility of a miscarriage of justice cannot be ruled out. A miscarriage of justice was discussed in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where the Supreme Court of India stated:-

> **"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretense…The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."**

30. The Supreme Court in **Republic vs. Karisa Chengo and 2 others (2017) eKLR** stated as follows:-

> **"[87] Article 50(2)(h) of the Constitution provides that "[e]very accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…" While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment."**

31. As I have stated elsewhere in this judgement, it is the court's duty to ensure that the provisions of Article 50 of the Constitution are complied with at all stages of the trial. In this case, notwithstanding the earlier report, the court ought to have interrogated the matter a little deeper and ought to have ensured that the appellant understood the proceedings throughout his trial. In the premises, I cannot say that the appellant was subjected to a fair hearing as required under Article 50 of the Constitution.

32. Coupled with that issue is the issue whether the trial in question complied with Article 50(2)(e) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay. In this case the appellant was arrested on 10th December, 2014. He was arraigned in court on 11th December, 2014. On 14th September, 2015 the prosecution was given a last adjournment. By that date not even a single witness had testified in the case. The first witness to testify did not take the witness stand until 23rd March, 2016, more than one year after the appellant was arraigned in court. The prosecution's case was not concluded till 4th October, 2017 after a total of 4 witnesses had testified. In my view the record does not inspire confidence in the criminal justice system. While I appreciate that the rights of the victims must be protected, those rights and those of an accused person must be balanced. In this case the prosecution seems to have been lethargic in prosecuting the case and even when they were indulged by the court the evidence presented was unsatisfactory.

33. Considering all the factors mentioned herein above, whereas it may well be that the failure to adhere to the constitutional provisions may not having been necessarily fatal taken alone, in my view the cumulative effect of the non-adherence to them coupled with the failure to satisfy the ingredients of the offence renders the appellant's conviction unsatisfactory.

34. In the premises, I hereby allow the appeal, set aside the conviction, quash the sentence and set the appellant at liberty forthwith unless otherwise lawfully held.

35. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 26th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Mogoi for the Respondent

CA Susan