REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL NO. 82 OF 2016

(CORAM: D. S. MAJANJA J.)

BETWEEN

JOHN LUFAYI KADANYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 3rd August 2016 in Criminal Case No. 291 of 2016 at Ukwala Law Courts before Hon. C. N. Wanyama, RM)

JUDGMENT

1. The appellant, **JOHN LUFAI KADANYA**, was charged and convicted of the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act***. The particulars of the offence were that on 23rd April 2016 in Ugenya District within Siaya County, he intentionally caused his penis to penetrate the vagina of LAO, a child aged 14 years. He also faced an alternative count of committing an indecent act with a child based on the same facts contrary to **section 11(1)** of the ***Sexual Offences Act***. He was sentenced to 20 years' imprisonment. He now appeals against the conviction and sentence.

2. In his petition of appeal, the appellant attacked the conviction on the ground that the trial magistrate relied on hearsay and that the testimony of the complainant was not corroborated. The appellant buttressed his case by filing supplementary grounds of appeal and written submissions.

3. The respondent opposed the appeal. Counsel for the respondent submitted that the complainant knew the appellant and that she gave clear evidence implicating him which evidence was corroborated by the other witnesses and the medical evidence. On the whole, she submitted that the prosecution proved its case.

4. As this is a first appeal, the duty of the court is to subject the evidence on record to a fresh review and scrutiny and come to its own conclusion while bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972) EA 32**).

5. The prosecution case was as follows. The complainant (PW 1), testified that on the evening of 23rd April 2016, her mother (PW 2) sent her to the shop to buy paraffin. She met the appellant at the shops and he bought her a soda. The appellant followed her, held her by her hand and directed her to a room where he shut the door. He pushed her on the bed, removed her clothes and proceeded to insert his penis into her vagina. During the night, he saw and torch shining and thought it was PW 1's mother so he told her to go out and hide in the bush. PW 1 slept in the bush and returned home the next morning. Her mother realized what had happened to her after she had taken a bath. Thereafter she was taken to the police station and then to Ukwala Hospital.

6. PW 2 recalled that on the evening of 23rd April 2016, she had sent to PW 1 to the shops and she did not return. She decided to look for her at the shop. She was told at the shop that the appellant had bought PW 1 a soda. She got her son, PW 5, and they went to confront the appellant but he denied that he had seen PW 1. She later reported to the village elder and assistant chief who came back and confronted the appellant who admitted that he had been with PW 1. The appellant was arrested and when she returned home, she found PW 1.

7. The village elder, PW 4, recalled that at about 8.00pm on 23rd April 2016, PW 2 reported to her that PW 1 had been missing since she left home earlier in the day. When she confronted the appellant about PW 1, he admitted to her, PW 2 and PW 5 that he had sexual intercourse with PW 1. She took him to the police station.

8. PW 7, the investigating officer, confirmed that while he was Bar Ober Patrol base, PW 2 reported that PW 1 had been defiled by the

appellant on 24th April 2016 at 9.30pm and that the appellant had been arrested by the village elder and members of the public. He recorded the statements and issued a P3 form. The P3 form was filled by PW 6, a clinical officer at Ukwala District Hospital, who examined PW 1 on 25th April 2016. She observed a swelling on vaginal wall and tenderness on cervical region. The hymen was absent and a whitish discharge noted. She opined that this was evidence of penetration.

9. In his sworn defence, the appellant denied the offence and told the court that he was arrested on 23rd April 2016 after a woman and some boys came and asked whether he had seen PW 1. He told them that he had not seen the girl. He was later arrested. In cross-examination, he denied that he was at the shop on that day and that he did not know the girl or her family.

10. The main issue for determination in this case is whether the prosecution established a case of defilement against the appellant beyond reasonable doubt. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

11. In this case the primary evidence of penetration was the evidence of PW 1. The baptism card produced in evidence by PW 7 showed that she was born on 13th July 2003 hence at the time of the incident she was aged 13 years 9 months. The case of ***Kibageny arap Kolil v R* [1959] EA 92** established that, *'a child of tender years'* means a child under the age of 14 years under ***Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)***. **Section 19** thereof provides:

> *19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.*

12. In ***Johnson Muiruri v Republic* [1983] KLR 445** and ***Kinyua v Republic* [2002] 1 KLR 256**, the Court of Appeal considered the procedural prerequisites before reception of evidence of a child and held that if, after the *voire dire* examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, the child possessed of sufficient intelligence and understands the duty of speaking the truth.

13. I therefore find and hold that the trial magistrate fell in error by failing to conduct a *voire dire* examination before taking the testimony of PW 1. The consequence of whether testimony is sworn or unsworn is important. Ordinarily sworn evidence does not need corroboration. **Section 19** of the ***Oaths and Statutory Declaration Act*** had a proviso which stated:

> *Provided that, where evidence admitted by virtue of this Section is given on behalf of the prosecution in any proceedings against any person for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.*

That section was amended and that proviso re-enacted as **section 124** of that ***Evidence Act (Chapter 80 of the Laws of Kenya)*** and a further proviso added thereto as follows:

> *Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.*

14. The failure to follow the prescribed procedure does not necessarily vitiate the trial. In ***Patrick Kathurima v Republic* CA NYR CR App. No. 131 of 2014 [2015]eKLR**, the Court of Appeal observed that;

> *The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt.*

15. In ***Maripett Loonkomok v R* CA MSA Criminal Appeal No. 68 of 2015 [2016]eKLR**, the Court of Appeal stated;

> *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*

16. In this case therefore, the testimony of PW 1 that she was sexually assaulted had to be corroborated in order to support a conviction. The testimony of PW 1 that she had been sent at home and did not return on the same day is corroborated by that of PW 2 and PW 5 who confirmed that she was not at home. The fact is also confirmed by the testimony of PW 4 who was informed and was involved in looking for PW 1. In his defence, PW 1 also stated that PW 2 and PW 5 came looking for PW 1. As to the element of penetration, the medical evidence produced by PW 6 confirms that there was penetration. Finally, the appellant was not a stranger to PW 1 and in as much as she did not know his name, she knew him as all the other witnesses confirmed that he was working in the neighbourhood. PW 1 testified he bought her soda

and proceeded to take her to the employer's house where he sexually assaulted hence the period they were together negates any notion of mistaken identity. The appellant's defence was a mere denial and in light of the sum of the prosecution evidence, it was proved that the act of penetration was caused by the appellant.

17. As I stated elsewhere in the judgment, there was sufficient evidence that PW 1 was aged 13 years old as per the baptisimal card produced in evidence. The sentence imposed is the minimum provided under **section 8(3)** of the ***Sexual Offences Act***.

18. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED IN NAIROBI

D. S. MAJANJA

JUDGE

DATED, SIGNED and DELIVERED at SIAYA this 19th day of February 2018

T. W. CHERERE

JUDGE

Appellant in Person

Ms Odumba**,** Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: Laban O. Odhiambo, Ishmael Orwa