



REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL NO. 101 OF 2016
(CORAM: D. S. MAJANJA J.)

BETWEEN

DAVID OWINO OGINJO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 23RD March 2015 in Criminal Case No. 1075 of 2014 at Bondo Law Courts before Hon. M. M. Nafula, SRM)

JUDGMENT

1. The appellant, **DAVID OWINO OGINJO**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (2)** of the ***Sexual Offences Act***. The particulars of the offence were that on 19th November 2014 at around 9.00pm within Nyawita Sub-location, Bondo District of Siaya County, he intentionally caused his penis to penetrate the anus of LA, a child aged 10 years. He was sentenced to 30 years' imprisonment.
2. He now appeals against conviction and sentence. The thrust of the appeal is that the prosecution did not prove its case as the complainant did not state that she was defiled. He contended that the medical evidence did not prove penetration. He avers that the prosecution evidence was contradictory, there was no corroboration and that there was no evidence linking him to the offence. The petition appeal was buttressed by additional grounds of appeal and extensive 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 at about 9.00am on 19th November 2014, she was sent by her mother (PW 2) to collect milk from the appellant. PW 1 testified that when she reached there, the appellant got hold of her, threw her on the bed, removed her pants, removed his clothes then proceeded to insert his penis into her vagina. After the act, she went back home

and informed PW 2 that the appellant had sexually assaulted her. PW 1 also told her sister PW 3 and her friend PW 4.

6. After PW 2 was told of the incident, she reported the matter to a village elder and the appellant was taken to the police station by PW 5, a police officer, who had been informed of the incident. PW 5 recorded witness statements and issued the P3 form. PW 1 was taken to Bondo District Hospital on the same day and was examined by a clinical officer, PW 6. He testified that the child was 10 years old and when he examined her genitalia, he found the hymen broken and multiple injuries on the vaginal walls. Although there were no spermatozoa seen, epithelial cells were present thus confirming penetration.

7. In his sworn defence, the appellant denied the offence and told the court that he was arrested on 20th November 2014 and taken to Bondo Police Station.

8. 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.*”

In this case the primary evidence of penetration was the evidence of PW 1 who was obviously child aged 10 years. Her evidence was supported by her sister, PW 3 aged 14 years and PW 4, aged 13 years. The position established in ***Kibageny arap Kolil v R* [1959] EA 92**, and followed in subsequent cases by the Court of Appeal, is that the phrase, ‘*a child of tender years*’ means a child under the age of 14 years (see ***Samson Oginga Ayieyo v R* CA KSM Criminal Appeal No. 165 of 2006 [2006]eKLR**). Although PW 1, PW 2 and PW 3 were children of tender years, the trial magistrate did not conduct a *voire dire* to determine whether the children should be sworn. The law governing reception of the evidence of a child of tender years is to be found at **section 19** of the ***Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)*** which 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.

10. The procedural prerequisite before reception of evidence of child of tender years under **section 19** of the **Act** has been considered by the Court of Appeal in several cases among them ***Johnson Muiruri v Republic* [1983] KLR 445** and ***Kinyua v Republic* [2002] 1 KLR 256**. The authorities show 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.

11. 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, PW 3 and PW 4 on oath. 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.

12. I now turn to the consequences of failure to follow the procedure. The authorities establish that 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.

13. 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.Appel No.11 of 2015

14. The question then is whether there is independent credible evidence to implicate the appellant in the offence charged. In other words, the testimony of PW 1 requires corroboration to support a conviction. The evidence is that PW 2 sent PW 1 to buy milk from the appellant and when she returned, she was in a distressed state. PW 1 narrated to PW 2 what happened immediately after the incident and when PW 1 was examined on the same day, there were bruises on her vaginal wall and her hymen was broken which are consistent with penetration. Both the fact of reporting to PW 2 immediately after the incident and the medical evidence corroborate the PW 1's testimony that there was penetration and the appellant is the person who sexually assaulted her. In his defence, the appellant did not mention anything about the incident of 19th November 2014.

15. The appellant complained that the essential witnesses were not called for example the elder to whom PW 2 reported and the people who arrested him. **Section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* states, "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact." Further in ***Bukenya and Others v Uganda [1972] EA 549***, the Court held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. I do not think that any other witnesses would have added anything to the prosecution case other than fortify the fact that the appellant was arrested after it was reported that he defiled PW 1.

16. The age of a child is a question of fact. PW 1 testified that she was 10 years old and PW 2 confirmed this fact and produced the baptismal card. It is not in doubt that PW 1 was a child and for purposes of the sentence, the age of the child attracts a sentence of life imprisonment under **section 8(2)** of the *Sexual Offences Act*. Since the appellant was not warned of the likelihood of enhancing the sentence at the hearing of the appeal, I affirm the sentence.

17. 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