REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 53 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

ERICK KITHINJI JOHN..........APPELLANT

AND

REPUBLIC................................RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. Kemei, SRM dated 12th April 2018 at the Senior Resident Magistrate's Court at Githongo in Sexual Offence Case No. 4 of 2018)

JUDGMENT

1. The appellant, **ERICK KITHINJI JOHN**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section (3)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the charges were that on 5th January 2018 at around 10.00pm in Imenti South within Meru County he intentionally caused his penis to penetrate the vagina of RM, a child aged 14 years.

2. The appellant was sentenced to 20 years' imprisonment and now appeals against conviction and sentence on grounds set out in the amended supplementary grounds of appeal and written submissions. The appellant submitted that the trial court erred in failing to comply with **section 19** of the ***Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)*** when taking the testimony of PW 1 and PW 2 and that the age of the child was not proved. The respondent supported the conviction on the grounds that the prosecution proved all the elements of the offence.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time 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**).

4. The facts of the case before the trial court were as follows. The complainant, PW 1, testified that she was 14 years old and on the afternoon of 5th January 2018 she was with the appellant. She narrated what happened as follows:

> *Erick carried me and took me to a place near the forest. We sat somewhere near the forest. He removed my clothes. I was dressed on a pant, biker, skirt and a blouse. He removed my panty and biker. He removed his trouser. He then started doing "tabia mbaya" to me. He lay one me (child shy's off from talking"). He used his thing to defile me. He put his thing for urinating into mine. I cannot tell if he had a condom. I felt pain. I did not bleed. I felt pain and that is when I screamed. He stopped and left me. He put on his clothes and put on mine.*

5. PW 2, testified that she was 14 years old and that she was with PW 1 and the appellant on the material day. She recalled that the appellant had a motorbike with which he took her to the forest while another male friend carried PW 1 and her friend. When they reached the forest, the appellant and PW 1 went aside while she and her friend remained behind taking photographs. In a short while she heard PW 1 screaming. She went where PW 1 and the appellant were and when she got close, the appellant released PW 1 and they both dressed up.

6. After the incident, PW 1 and PW 2 and the other boys they were with went to sleep in a room hired by one of the boys. While they were having breakfast, the chairman of the local community policing came and told them to call their parents. They were taken to the Administration Police Camp at Githongo. PW 3, the Assistant Chief, recalled that on 6th January 2018, she was called by the chairman of the community policing who informed her that he had seen some girls at a hotel. She organized for the girls to be given breakfast and then taken to the Police Post. PW 1 told her that she had been defiled by the appellant and on 7th January 2018 at 10.00am, she arrested the appellant who denied the charges.

7. The doctor who examined PW 1 testified that he filled the P3 form after examining her on 9th January 2018. He noted that on examination the genitalia, the hymen was broken which was an indication of penetration and that there was whitish discharge from the vagina. The laboratory examination did not reveal any spermatozoa but disclosed a bacterial infection.

8. The investigating officer, PW 6, recalled that on 6th January 2018 at about 6.00pm, PW 3, called to inform him that she had arrested two young girls and they were at the Administration Camp. He organized for the girls to be picked up and brought to the police station. He took their statements and issued a P3 form for PW 1 to be examined and for her age to be assessed.

9. The appellant denied committing the offence in his sworn defence. He recalled that on 5th January 2018 as he was heading to Githongo from Kithirune, he met three girls who wanted to be carried but since he was in a hurry to go and pick a customer, he left them. At about 7.30pm, he met his friend and they went to a petrol station where they met three girls including PW 1 and PW 2. His friend asked him to take them home. As his friend agreed to pay the fare, he carried two girls and his friend carried two others and he dropped them at a tea buying centre before he left to pick another customer from where he went home. On the next day he was arrested by PW 3. The appellant's wife, DW 2, told the court that the appellant would always come home between 8.00pm and 8.30pm and he never committed the offence as he never cheated on her.

10. In order to prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant 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. Before I consider the facts of the case, the appellant raised the issue about the testimony of PW 1 and PW 2. He contended that since they were children of tender years, the trial magistrate ought to have conducted a *voire dire* before accepting their testimony. 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)***. The procedural prerequisite before reception of evidence of a child of tender years under **section 19** of the ***Act*** has been considered by the Court of Appeal in several cases including ***Johnson Muiruri v Republic*** **[1983] KLR 445** and ***Kinyua v Republic*** **[2002] 1 KLR 256**.It has been 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 is possessed of sufficient intelligence and understands the duty of speaking the truth.

12. The issue here turns on whether the witnesses were children of tender years. PW 1 and PW 2 testified that they were aged 14 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. It remains unchanged despite the definition of a child under the ***Children Act*** as the ***Oaths and Statutory Declarations Act*** specifically deals with the competence of children to testify rather than the rights of the child (see ***Samson Oginga Ayieyo v R*** **CA KSM Criminal Appeal No. 165 of 2006 [2006]eKLR**). Since the evidence shows that both children were 14 years, the trial magistrate did not commit any error in failing to conduct a voire dire before receiving their evidence.

13. Even if the trial magistrate erred in this respect, it is now established 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.*

14. The prosecution case was that the appellant was among other boys who took PW 1 and her friends for a ride out in the forest with a prurient intent. The fact that the appellant was not a stranger is confirmed by his own defence in which he admitted meeting PW 1, PW 2 and her friends and having carried them. His defence also puts him in the locus of the incident. Further although the incident took place in the evening, nothing turns on identification because the parties had interacted for some time.

15. PW 1 gave clear evidence on the fact of penetration as I set out above. Her testimony was sufficient to support a conviction without any corroboration in light of the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***. It provides that the trial court may proceed to convict an accused on a sexual offence without corroboration, if, for reasons for reasons to be recorded, the court believes the victim. In this case referring to both PW 1 and PW 2, the trial magistrate stated that, *"I had a chance to see PW 1 and PW 2 testifying before me. They appeared truthful, firm and consistent in their evidence and I believed them."* PW 1's testimony was corroborated by that of PW 2 who was present at the scene. She heard her scream and when she went there she found the two of them in a state of undress. The medical evidence also supports the fact of penetration.

16. As I stated before, the appellant's defence puts him at the *locus in quo* with PW 1 and PW 2 and in light of the totality of the evidence, the trial magistrate properly rejected his defence. The testimony of DW 2 did not add anything to the fact that one the material day, the appellant defiled PW 1. I therefore find and hold that the appellant is the person who caused the act of penetration to PW 1.

17. The question of age is a matter of fact. PW 1 testified that she was 14 years old. When an age assessment was done, it showed that the child was between 12- 16 years. For purposes of the offence, PW 1 was below the age of 18 years. The precise or apparent age is a question for determining the sentence to be imposed. In this case, the age assessment suggested that she was between the age of 12 – 16 years old. In this instance, the appellant is entitled to the most favourable interpretation of the evidence. In the circumstances, I would hold that PW 1 was 16 years old and the sentence determined in line with **section 8(4)** of the Act which provides for the minimum sentence of 15 years where the age of the child is between 16 and 18 years.

18. I affirm the conviction. I allow the appeal on sentence, set aside the sentence of 20 years' imprisonment and substitute it with a sentence of 15 years' imprisonment.

DATED and DELIVERED at MERU this 25th day of October 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kiarie, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.