REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 11 OF 2016

BETWEEN

TONY OMONDI OGUTU……..……...…...APPELLANT

AND

REPUBLIC…...…….……..……...RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C. N. Njalale, RM dated 3rd March 2016 at Principal Magistrates Court at Winam in Criminal Case No. 1098 of 2011)

JUDGMENT

1. In the subordinate court, the appellant **TONY OMONDI OGUTU** faced a charge of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act, 2006.*** The particulars were that on 30th September 2011 at about 5.30pm in Kisumu East District within Nyanza Province, he intentionally and unlawfully caused his penis to penetrate the vagina of WT, a child aged 6 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offence Act***. After the trial he was convicted and sentenced to life imprisonment. He now appeals against conviction and sentence.

2. Before I consider the issues raised in this appeal, I must restate the principles applicable in considering a matter such as this. The duty of the first appellant court is to review the evidence, evaluate it and reach an independent conclusion as to whether to uphold the conviction. In so doing, the court must make an allowance for the fact that it never saw or heard the witnesses testify (see ***Okeno v Republic*** **[1973] EA 32)**. The facts that emerged at the trial were as follows.

3. After a *voire dire* examination, WT (PW 2) testified that she was 5 years old and was attending school. She told the court that on 30th September 2011 she was from school when she me the appellant whom she knew. The appellant took her to their house. She described what took place as follows;

> *He offered me chapati. He took me to his bedroom, in the bedroom he removed my skirt. He removed his trousers, I had shirt, skirt and pantie, He removed my pants. He took his "Dudu" and put into mine. He roughed them. I told him to stop. I felt pain. He continued it. He did not stop. He stopped after say an hour. I bled from my private part. The blood was not much.*

PW 2 went home and found her aunt who helped her take a bath. Later on her mother and grandmother came and took her to hospital.

4. PW 2's grandmother, PW 1, recalled that on 30th September 2011 at about 5.00pm, her daughter told

her that PW 2 had been injured in her private parts. She went where PW 1 was and took her to the clinic where she was examined. PW 3, a police officer at Kondele Police Station, told that court that on 5th October 2011, she was instructed to investigate a case of defilement that had been recorded in the Occurrence book. She recorded statements from the witnesses and issued a P3 form. PW 4, a Clinical Officer at Kisumu District Hospital, testified that he examined PW 2 on 5th October 2011 and his findings were that she had a torn labia minora, lacerations on the vagina walls and the hymen was not intact. There was also a smelly discharge. He noted that from the examination done at initial clinic, there were no spermatozoa and the HIV tests were negative. He concluded that there was penetration.

5. The appellant (DW 1) elected to give a sworn testimony in his defence. He denied the charge against him and stated that he could not have been at home on the date and time alleged by PW 2 as he would leave normally home in the morning and return at 6.00pm in the evening. He denied that he was at home at 5.30pm when the offence is alleged to have taken place. He also stated the it was impossible to defile PW 2 in his mother's bedroom as the house had only two rooms while his brothers were at home on the material day. He recalled that on 4th October 2011, PW 2's father, mother and brother came to their house and had him arrested after threatening him. He alluded to difference between PW 2's mother and his mother (DW 2).

6. The appellant's mother, DW 2, testified that on 30th September 2011 at around 4.00pm, she was with her two sons as they had come from school. DW 1 came home from town at about 6.00pm and although PW 2 lived about 100 metres away, she did not see her on that day. She denied that DW 1 could have had sexual intercourse in her bedroom yet he slept in the sitting room. She told the court that in 2007, PW 2's mother complained to her the price of water was too high and they never talked or greeted one another after that. She confirmed that the accused was arrested on 4th October 2011 by PW 2's father, mother and two boys.

7. The appellant's 11-year-old brother, DW 3, recalled that on 30th September 2011, he went to school in the morning and came back at about 5.30pm. He stated the appellant arrived home at about 6.00pm and found him, another brother and their mother. He recalled that PW 2 mother came to their home with 3 other people on 4th October 2011 and arrested the appellant. He also confirmed that PW 2 lived close to them. The appellant's elder brother, DW 4, recalled that on the material date he was at home at about 5.30pm and found his mother and brother. He left to go and wash his clothes and returned. He testified that the appellant returned at 6.00pm after work. He recalled that he did not hear anything of the incident until 4th October 2011 when the appellant was arrested.

8. The learned magistrate was convinced that the appellant had committed the offence and convicted him hence this appeal. 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."*

9. Before I consider the evidence, I should comment on a procedural issue concerning the testimony of PW 2 who in law is a child of tender years as she was 5 years old. The *voir dire* was conducted in the following manner;

> *PW2*
>
> *I stay in Mamboleo with my mum and dad. My dad is DO, mum is DMO. We formerly lived in [particulars withheld]. I school at [particulars withheld] in Standard 1. My class teacher is TM. She teaches English and Social Studies.*
>
> *Court – The witness is seized of enough intelligence to be sworn. She be sworn.*

10. 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.*

11. From the extract of the record before the trial court I have set out at para. 9 above, the child was merely asked about her parents, school and teacher. No questions were put to her to determine whether or not she understood the nature of the oath or if not, whether she possessed sufficient intelligence and understood the duty of telling the truth to justify reception of her evidence.

12. The procedural prerequisite before reception of evidence of child of tender years under **section 19** of the ***Act*** has been considered in numerous decisions of the Court of Appeal particularly ***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, he is possessed of sufficient intelligence and understands the duty of speaking the truth.

13. The authorities go further and 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 as follows;

> *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. Following the principles, I have outlined, it is clear that the learned magistrate failed to examine the child in accordance with **section 19** of the ***Oaths and Statutory Act***. The examination carried out was perfunctory and of little use in assisting the court assess whether the child should be sworn. In the circumstances, I hold that the proper approach is consider PW 2's testimony as unsworn testimony and evaluate the rest of the evidence to see whether it can sustain a conviction.

15. On the issue of penetration, the PW 2's testimony, which I have outlined at para. 3 above, established that the fact of penetration. The child's testimony was intelligible and consistent. The testimony on this issue is corroborated by the evidence of PW 4, the clinical officer, who examined her. Counsel for the appellant disputed the medical evidence on the grounds that the child was examined one week after the incident and that the vaginal discharge was not tested to confirm its nature. He also noted that not bruises were observed on the appellant's penis. While it is true that PW 4 examined the child after sometime, his own examination revealed that the child had, *"torn labia minora, lacerations on the vaginal walls, the hymen was not intact …."* In my view all these are indications of trauma of the genital area consistent with penetration.

16. Did the appellant commit the felonious act? It was common ground that the appellant and the complainant lived in the same locality indeed a few houses from each other and PW 2 testified that the appellant was a person known to her and indeed she gave his name to PW 1. Further the incident took place at daytime in circumstances that negative any suggestion of mistaken identity.

17. In response to this evidence, the appellant raised the defence of an alibi. The tenor of his evidence and that of his witnesses was that it was not possible for him to be at home on the material day and time and that it was also not possible for him to have sexual intercourse in his mother's house. He also raised the fact that the there was a grudge between his mother and PW 2's mother. Counsel for the appellant

contended that the prosecution failed to call three crucial witnesses; PW 2's father and mother and PW 2's aunt to whom she made the initial report. Counsel submitted the court was entitled to make an adverse inference in their absence.

18. Under **section 143** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, the prosecution is not required to call all or any particular witnesses to prove a fact. From the testimony and recorded statement of PW 1, which was produced by the defence, the incident took place on 30th September 2011 and it is only on 4th October 2011 that PW 2 disclosed to PW 1 what had happened to her. When cross-examined by counsel for the appellant, PW 2 stated that, *"Tony told me not to reveal it to my mother. That I would be beaten. I did not tell my mum about it. I told grandmother."* On her part PW 1 stated in cross-examination that PW 2 told her that the appellant had threatened to beat her if she told her mother. In light of this evidence, I am unable to draw any adverse inference. It is clear that the child was threatened and was only able to disclose what happened to her in the safety of her grandmother, PW 1 hence it would be unnecessary to call the child's mother, father or aunt.

19. I have weighed the prosecution case against that of the defence and I am satisfied that the PW 2 was sexually assaulted by the appellant whom she knew. PW 2's testimony was credible and consistent and was corroborated by the medical evidence. The fact that she told PW 1 at the earliest opportunity lends credit to her testimony. There was no ulterior reason for a 5-year-old child, who suffered serious injuries in her genitalia, to implicate the appellant.

20. Counsel for the appellant argued that the age of the child was not conclusively proved. Proof of the age of a child is a question of fact and may be proved by any evidence that will assist the court reach a finding on the child's age. Counsel for the appellant submitted that age must strictly proved otherwise the offence is not established. He cited several High Court decisions; ***Martin Gitonga Kinyamu v Republic*** **MRU HCCRA No. 24A of 2011 [2015]eKLR**, ***Hillary Nyongesa v Republic*** **ELD HCCRA No. 123 of 2009 (UR)** and ***Dominic Kibet Mwareng v Republic*** **KTL HCCRA No. 155 of 2011 [2013]eKLR**. The dicta in these case had been clarified and superceded by what the Court of Appeal stated in ***Moses Nato Raphael v Republic*** **NRB CA CRA No. 169 of 2014 [2015] eKLR**;

> *On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in* ***Tumaini Maasai Mwanya v. R****,* ***Mombasa CR.A. No. 364 of 2010****, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.*

21. Although PW 2's birth certificate was not produced, there was no suggestion that PW 2 was aged above 18 years. According to the P3 form, PW 4 assessed PW 2's age as 6 years. Thus the age of the child fell with **section 8(2)** of the ***Sexual Offences Act*** which attracts a life sentence. The sentence, being mandatory, was properly imposed.

22. The prosecution proved the appellant's guilt. I affirm the conviction and sentence.

23. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 31st day of August 2016

D.S. MAJANJA

JUDGE

Mr K’Owinoh instructed by K’Owinoh and Company advocates for the appellant.

Ms Osoro, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.