REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 66 OF 2015

JOHN OTIENO RABONGO.......................................APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Appeal arising from the judgment of P.Y. KULECHO, RM in Migori Chief Magistrate's Criminal Case No. 772 of 2014 delivered on 15/07/2015)

JUDGMENT

Background:

1. JOHN OTIENO RABONGO, the Appellant herein, was arraigned before the Chief Magistrate's Court at Migori in Criminal Case No. 772 of 2014 on 08/12/2014 and faced three substantive charges being defilement, committing an indecent act with a child and deliberate transmission of a life threatening sexual transmitted disease.

2. He denied the charges and the trial was later on conducted and judgment delivered on 15/07/2015 where the Appellant was found guilty, convicted and sentenced to 20 years imprisonment. The right of appeal was explained.

3. Being aggrieved by the said conviction and sentence the Appellant preferred an appeal and raised several grounds. The appeal was eventually heard hence this judgment.

Discussion and Determinations:

4. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

5. In line with the foregone, this Court on revisiting the record came across the manner in which the complainant's evidence was taken among other issues. There is hence the need to satisfy ourselves that the said evidence was properly taken prior to dealing with any other aspects of this appeal.

6. From the record the age of the complainant who testified as PW1 was not well settled. The complainant

herself stated her age to be 13 years and that she was in Standard 4 at [particulars withheld] Primary School. PW2 who was the complainant's uncle and her guardian also stated that the complainant was 13 years old and in Standard 4 aforesaid. The investigating officer who testified as PW5 also confirmed the complainant's age to be 13 years old. PW6 who stepped in for PW5 at a certain time attended court on 25/05/2015 and produced an age assessment report which had been prepared by a Dental Surgeon one Dr. Otieno, J.O. of Migori District Hospital and dated 22/05/2015. The said report indicated the complainant's age as ***'14 plus/minus 1 year'***. But when PW6 was cross-examined he stated that:

> ***'….The age is an estimate. It was estimated to be fourteen years old.***
>
> ***The complainant must have been thirteen years old at the time she was defiled…'***

7. The trial court appears to have still been uncertain in its judgment on the issue of the complainant's age when it expressed itself thus:

> ***'….the child's age assessment report showing she was aged about fourteen…'*** (emphasis added)

8. I have decided to venture into the issue of the complainant's age not only because of the bearing the aspect of age has in sentencing, but principally in respect to how the complainant's testimony was taken before the trial court.

9. Looking at the evidence on the complainant's age in totality and in view of the leverage given by the age assessment report it could not have been held with certainty that the complainant was aged 14 years old. She could have been 13 years, 14 years or even 15 years. However the complainant, PW2, PW5 and PW6 were all of the view that the age was 13 years. The treatment notes produced as well as the complainant's P3 Form equally indicated the age to be 13 years too. Likewise the age assessment report did not rule out the possibility of the age to be 13 years.

10. I therefore and with a lot of respect differ with the learned trial magistrate when she firmly found that the complainant's age was 14 years old.

11. The record reveals that the complainant was the first witness to testify and she indicated her age as 13 years old. She was sworn and proceeded to testify.

12. But what does the law and settled judicial precedent have to say on this issue?

13. **Section 19** of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya states as follows: -

> ***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, shall be deemed to be a deposition within the meaning of that section.***
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> ***2) If any child whose evidence is received under sub-section (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.***

14. However the Act does not define a child of tender years. **Section 2 of the Children Act, No. 8 of 2011** defines a child of tender years as follows:-

"child of tender years means a child under the age of ten years."

The above definition however is for the purposes of the Children Act and not necessarily applicable in criminal matters under the Sexual Offences Act.

15. The question of who a child of tender years is has been a subject before the Court of Appeal on several occasions and in the case of **JOHNSON MUIRURI –vs- REPUBLIC (1983)KLR 445**, the appellate Court held as follows: -

> ***"The matter whether a child is of tender years or not is a matter of the good sense of the court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression "child of tender years" for purposes of section 19 of the Oaths and Statutory Declarations Act (Cap 15)."***

In the case of **KIBAGENY –vs- REPUBLIC (1959)EA 92,** the Court of Appeal rendered itself thus on the matter: -

> ***"there is no definition in the Oaths and Statutory Declarations Ordinance of the explanation "child of tender years" for the purposes of Section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or an apparent age of under fourteen years."***

16. In view of the foregone it was incumbent upon the trial court to, at the very first instance, satisfy itself if the complainant was a child of tender years or not. That decision would have determined how the rest of the evidence would have been recorded. The court hence fell into error.

17. In my view and going by the foregone discussion, the trial Court on learning of the complainant's age as 13 years old ought to have declared her a child of tender years and proceeded to receive her evidence as required in law.

How is the evidence of a child of tender years received by a trial Court?

18. The Court of Appeal in an answer to the said question elaborately stated the available procedure in the case of **JOHNSON MUIRURI vs R (1963) KLR 445** as follows: -

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are rendered as witnesses. In Peter Kirigo Kiune, Criminal Appeal No.77 of 1982 (unreported) we said: -***
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> *"When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voir dire examination, whether the child understands the nature of an oath in which event 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 Declaration Act, Cap 15). The Evidence Act (Section 124, Cap 80). It is important to set out the questions and the 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."*

19. In the case of **Oloo s/o Gai vs R (1960) EA 86**, the Court of Appeal noted that it could 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.

20. In our case, I equally hold the view that it was so necessary that the trial Court satisfy itself, through a ***voir-dire examination***, that the complainant understood the nature of an oath before being sworn to give

evidence or even to ascertain that she was sufficiently intelligent to give evidence even if not on oath.

The record reveals that none of the foregone took place.

<u>What is the effect of such non-compliance?</u>

21. In the case of **<u>SAMUEL WAHINI NGUGI vs R (supra)</u>** the Court of Appeal held as follows: -

> ***"In our view, he needed even out of caution to have done so, noting that the child before him was aged twelve (12) years. The effect of the failure to strictly comply with those requirements on the trial will depend on the circumstances of each case. In the circumstances for the case, we find that the trial was vitiated, the conviction cannot stand and the sentence of 21 years imprisonment cannot also stand. Both are set aside."***

22. Again, the Court of Appeal in **<u>JOHN OKENO OLOO -vs- R, Criminal Appeal No. 350 of 2003 (unreported)</u>** stated as follows:-

> ***"In our view, whereas we agree that as concerns C, who was said was 13 years old, the trial court should have, note of caution, formed an opinion on a voir dire examination whether she understood the nature of an oath before she could be sworn. We do not agree with the superior court that failure to do so could not have occasioned miscarriage of justice had that been their only witness on the issue that was before the Court."***

23. The evidence of the complainant was the most crucial piece of evidence from which all the other witnesses built upon. Without the evidence of the complainant, the other evidence put together would definitely not hold a conviction on any of the charges the Appellant faced. To that end, I find that the conviction is not safe and is hereby set-aside together with the sentence of 20 years imprisonment.

<u>Way Forward?</u>

24. The above core issue that has led to the setting aside of both the conviction and sentence in this matter was on the part of the Court and not on the prosecution.I will therefore consider whether or not to order a retrial. The law as regards what the Court should consider on whether or not to order a retrial is now well settled. The Court of Appeal in the case of **<u>Samuel Wahini Ngugi v. R (2012)eKLR</u>** stated as follows:

> ***"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of <u>Ahmed Sumar vs. R (1964) EALR 483</u>, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
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> *'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered………In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'*
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> ***That decision was echoed in the case of <u>Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported)</u> when this Court stated as follows:***
>
> *"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."*

25. The admissible evidence or potentially admissible evidence, upon complying with the law in this case, and without going into the merits of it, is likely to lead to a conviction. The offences allegedly committed are not only very serious but also beastly and the innocent, helpless and vulnerable victim will no doubt be affected for the rest of her life moreso whenever such memories take her back. The Appellant has been incarcerated for less than one year. The witnesses in the case are within the complainant's neighbourhood and as such it will not be difficult to trace them including the Clinical Officer and the Police.

26. This Court is therefore of the considered view that the ends of justice will be served by an order of retrial. It is so ordered.

Conclusion:

27. In view of the above unfolding events, this court is of the view that dealing with the other issues in the appeal will not add any value.

28. Consequently, the Appellant will therefore be released into police custody and be produced before any court competent to try him except Honourable P. Y. Kulecho. This should be in the next 10 days of this judgment.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 13th DAY OF NOVEMBER, 2015

A. C. MRIMA

JUDGE