**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 34 OF 2013**

**KIVEVELO MBOLOI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 569 OF 2012*

*IN THE PRINCIPAL MAGISTRATE'S COURT AT MWINGI – V.A. OTIENO (AG. SRM) ON 15TH JANUARY, 2013)*

**JUDGEMENT**

The Appellant, Kivevelo Mboloi was in Mwingi Magistrate's Court Criminal Case No. 569 of 2012 charged with defilement contrary to Section 8(1) as read with sub-section (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge revealed that on 30th September, 2012 at [particulars withheld]Sub-Location, Masukini Location in Mwingi Central District within Kitui County the Appellant penetrated the female genital organ namely vagina of E.M. a child aged 6 years with his male genital organ namely penis.

In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars stated that on the date and place mentioned in the main count the Appellant committed an indecent act which caused contact of his male genital organ namely penis with the female genital organ namely vagina of E.M. a girl aged six years.

At the conclusion of the trial, the Appellant was convicted and sentenced to life imprisonment. The Appellant being aggrieved by both conviction and sentence has appealed to this Court.

A perusal of the grounds of appeal in the Appellant's petition of appeal filed on 18th March, 2013 shows that the Appellant is complaining for being convicted in circumstances in which the prosecution had not proved its case beyond reasonable doubt as required by the law.

Mr. Mulama for the state opposed the appeal and submitted that the Appellant did not establish grounds to enable this Court disturb the conviction and sentence.

I will start by considering the issues of law. The complainant was aged six years making her a child of tender years. A *voir dire* examination was therefore necessary before her evidence could be received.

A *voir dire* examination is essentially a pre-testimony procedure. It is only after the examination that the Court can decide whether the witness is intelligent enough to give evidence. It is also after this interview

that the Court can decide whether the witness understands the meaning of an oath and thus should be sworn or simply appreciates the importance of telling the truth and should therefore adduce unsworn testimony.

The Court of Appeal gave its guidance on the issue of voir dire examination in **JOHNSON MUIRURI v. REPUBLIC [1983] KLR 447** at pages 448-450 as follows":-

**"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.**

**In *Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported) we said:***

**"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his 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 Declarations Act, cap 15. The Evidence Act (section 124, cap 80).**

**It is important to set out the questions and 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."**

**A similar opinion was expressed by the Court of Appeal in England recently in *Regina v Campell* (Times, December 10, 1982):**

**"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.**

**Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in *R v Lal Khan* [1981] 73 Cr App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen....**

**There Lord Justice Bridge said:**

**'The important consideration... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.'**

**There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life."**

**It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in *Oloo s/o Gai v R* [1960] EA 86 the Court of Appeal said that it would 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; since the judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years**

**and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand.**

**In *Gabriel s/o Maholi v R* [1960] EA p 159, again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.**

**In *Kibangeny Arap Kolil* [1959] EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial judge to warn himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal."**

I have reproduced the decision of the Court of Appeal at length since it captures the importance of a *voir dire* examination. The principles surrounding this examination are clearly enunciated in the decision and I need not restate them.

Applying the law to the facts of the case before me, it becomes apparent that no *voir dire* examination was conducted on the complainant child. The complainant just proceeded to give unsworn testimony thus:-

**"My names are E.M.** (full name of the complainant omitted by this court). **I go to [particulars withheld] Primary school. I am in nursery. I attend church where we are taught the importance of speaking the truth. I am six years old."**

From the answers it can be said that the trial magistrate conducted a *voir dire* interview. The evidence of the complainant in its entirety shows that she was intelligent enough to testify and understood the importance of telling the truth. One may say that no prejudice was caused to the Appellant by the failure to conduct a *voir dire* examination. The Appellant was indeed given an opportunity to cross-examine the witness. Unfortunately that is not the way to go. The trial magistrate did not record his decision as to whether the child was possessed of sufficient intelligence and whether she appreciated the importance of telling the truth. It was imperative that a *voir dire* interview be conducted considering the serious nature of the offence with which the Appellant was charged. Failure to conduct a *voir dire* examination therefore rendered the evidence of the complainant of no use to the Court.

After going through the trial Court's proceedings, I find that there is no indication whatsoever of the language of choice of the Appellant. The Appellant did not complain about this issue but it is important for the trial Court to always indicate the language(s) used in the trial. Even the language used by the witnesses ought to be indicated. It is, however, apparent from the Court record that the Appellant understood the proceedings and fully participated in the trial. No prejudice was therefore occasioned to the Appellant by this failure of the trial Court.

In saying so, I am guided by the decision of the Court of Appeal in **GEORGE MBUGUA THIONGO v REPUBLIC, Criminal Appeal 302** of **2007.** In that case the Court stated that:-

**"22. For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."**

The danger of failing to indicate the language used is that the trial may be declared a nullity. It would cause no harm if at the beginning of the trial the Court records, in the words of an accused person, the language the accused person intends to use in the trial. Where an accused person's language of choice is not the national language (Kiswahili) or the official languages (Kiswahili and English), the name of the interpreter for the language selected by the accused person should also be found in the Court record.

This being a first appeal, I have to put the evidence adduced under a microscope, dissect it and arrive at my own conclusion on the same. I, however, take into account the fact that I did not see or hear the witnesses testify – see **OKENO v. R. [1972] E.A. 32** and **OGETO v. R. [2004] 2 KLR 14.**

I have already concluded that the evidence of the complainant amounted to nothing. The question is whether there is any other evidence to show that the complainant was defiled and whether such defilement can be linked to the Appellant.

PW2 A M told the Court that she is the mother of the complainant. On 30th September, 2012 at around 2.00 p.m. she received a call from K N informing her that her daughter had been defiled. She proceeded home and examined the complainant. She testified that she saw sperm and bloodstains and went and reported the matter to the police at 6.00 p.m. They told her to come back the following day. She was instructed not to wash the child. She told the Court that the girl was six years old and her birth documents had been destroyed in a fire.

PW3 N K told the Court that the complainant reported the incident of defilement to her.

PW4 Dr. Edward Indumwa stated that when the complainant was examined a day after the incident, a mucus like substance was seen on her clothes. The upper vaginal canal was bruised but the hymen and labia majora were intact. He formed the opinion that there was attempted penetration.

In his evidence the Appellant denied sexually assaulting the complainant.

The evidence that was adduced before the trial Court clearly confirms a sexual assault on the complainant. Immediately after the assault the complainant reported the incident to PW3 and named the Appellant as the person who had defiled her. The mother of the complainant (PW2) and PW4 confirmed that the complainant had injuries in her genital organ. PW2 saw sperm while the medical officer who first came into contact with her saw mucus like substance on her clothes. A bruise was also seen. PW3 who received the report of defilement from the complainant confirmed that she had seen the Appellant just before the disappearance of the complainant. She also noted that the complainant was no longer in the company of the other children. The Appellant's defence was indeed a mere denial. In light of the evidence of the prosecution witnesses the said denial cannot be believed. The whole story was consistent and even without the evidence of the complainant I am satisfied by the evidence of the other witnesses that the Appellant is the person who had an unholy contact with the complainant.

The remaining issue is whether that contact amounted to defilement. For defilement to be established there must be prove of penetration. Section 2 of the Sexual Offences Act, 2006 defines penetration as **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

PW4 testified that the complainant's hymen was intact. He talked of attempted penetration. That means that the offence of defilement was not committed. There is however clear evidence that the Appellant brought his penis into contact with the opening of the complainant's genital organ. That amounts to an indecent act as per Section 11(1) of the Sexual Offences Act, 2006. The trial magistrate should have convicted and sentenced the Appellant on the alternative charge.

The Appellant's appeal therefore succeeds so that the conviction in respect of the main count, which the trial Court referred to as count 1 in the judgement, is set aside and replaced with a conviction on the alternative charge. The alternative charge attracts a minimum sentence of ten years imprisonment. The life sentence imposed is therefore set aside and substituted with a sentence of ten years imprisonment to

run from the date of sentencing i.e. 20th February, 2013.

Orders will issue accordingly.

Prepared, Dated and signed this 27th November 2013

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

Dated and delivered on 3rd day of December, 2013

**S.N.MUTUKU**

**JUDGE OF THE HIGH COURT**