REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 21 OF 2020

APPELLATE SIDE

(CORAM: ODUNGA, J)

DNN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable E C C Oluoch

dated 7th June, 2019 in Mavoko CM's Court Case No. SO 3 of 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

DNN.....ACCUSED

JUDGEMENT

1. The appellant, **DNN**, was charged with offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on diverse dates during the month of December, 2017 in Athi River Sub-County within Machakos County, intentionally caused his genital organ (penis) to penetrate the female genital organ (vagina) of one PW, a child aged 8 years.

2. In the alternative the accused was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act No.3 of 2006.*** The particulars were that on the same diverse dates at the same placed, the Appellant, intentionally and committed an indecent act by allowing his male genital organ (penis) to come into contact with female genital organ (vagina) of the same minor.

3. The Appellant pleaded not guilty and the matter proceeded to full hearing.

4. After *voir dire* examination was conducted, the court found that the complainant was possessed of sufficient intelligence and understood the solemnity of an oath and was accordingly sworn.

5. According to the complainant who testified as PW1, she was staying with her parents. Sometimes in December, 2017, upon her return home from school, at night her father, the appellant who was in the house told her to lie on the bed which she did facing down while the appellant who was standing, told her to remove her clothes, a dress and pant. The appellant then removed her clothes and touched her vagina with his finger. He then removed his clothes, a pair of trousers and a shirt and using his fingers touched her vagina by his fingers as well as his penis. In the process the complainant felt pain though she did not tell the appellant so. After that the appellant put on his trousers.

6. It was the complainant's evidence that though it was at night, there was a candle and that that was the only day, the appellant did that to her. At that time her mother was not present and because she feared that her mother would take up the issue with the appellant who would

beat her, she did not reveal the incident to her. It was her evidence that apart from the appellant no one else did the same to her.

7. It was her evidence that she was taken to hospital by a lady called **Njeri** who was asked to do so by one **Mama Wayu** to whom she disclosed the incident.

8. In cross-examination, the complainant admitted that there was a day she was sent home from school to call her parents but she ended up spending the night at **Mama Wayu's** place. On her way home, she met her mother. She however denied that she was couched to tell lies.

9. PW2, **PC Mercelyn Sikotia**, the investigating officer was assigned the said case of an alleged defilement in which a suspect had been arrested. She got hold of the complainant who had been taken to Nairobi Women's Hospital and took her to Bondeni Children's Home. According to her, the report was that the complainant had been defiled and though she could not recall the date, it was a repeated act in the month of December, 2017. Upon interrogating the complainant, the complainant informed her the she had returned home from school when her father, the appellant, removed her clothes, touched her private parts, removed his clothes and inserted his genital organ in her vagina. The appellant then threatened the complainant against speaking out. That the appellant was the complainant's father was confirmed by her mother as well. From the complainant's birth certificate, it was confirmed that she was 8 years old. The PRC form showed that the complainant had a broken hymen her. He exhibited the age assessment form.

10. The next witness was **Pauline Kalimbe Wambu**, who ought to have been PW3 but was indicated as PW2, was a member of *Nyumba Kumi* Initiative/Community Policing. According to her, on 5th January, 2018, two women whose names she did not know, informed her that a child, the Complainant herein, was being defiled by the father. She then sent one of then to bring the Complainant and at 6.00pm the complainant was taken to her. Upon being taken, the complainant informed her that she wanted to be taken to her grandmother because the father was defiling her whenever the mother went to work during the day since the mother would leave for work at 5.00pm and the father would defile her in the morning. However, the complainant narrated, whenever she tried to report the incident to the mother, the mother would beat her hence she feared narrating the same to the mother. The complainant disclosed to her that she was feeling pain in her private parts.

11. The witness then called one **Hadija**, PW7, also a member of the Community Policing who went accompanied by a village elder and showed them the child. The complainant then suggested that they go to the school since she feared being beaten if she went home. Thereafter they went to the school and talked to the head teacher and the Chief advised them to report the matter to Athi River Police Station. According to the witness, she did not know the complainant's home or her family before the incident and she only saw the complainant's father when they took her to school where the father had gone to look for her. She stated that she was present when the father, whom she identified as the appellant, was arrested in his house upon being identified by the Complainant as the person who was defiling her.

12. In cross examination, she revealed that the lady who gave her the information was known as **Mama Slay** and she recorded what **Mama Slay** told her. She denied that she had previous problem with the appellant.

13. PW3, (ought to have been PW4) **Francis Kyule**, the chairman of *Nyumba Kumi* for Kilili Area, on 7th January, 2018 received a call from other members of the initiative that there was a child who was complaining that she was being defiled by the father. The child who was unknown to him prior to that date, was in standard one. He proceeded to the school and talked to the head teacher and the child was released to them and they took her to the police. Accompanied by **Hadija Chege**, PW7, they took the complainant to Nairobi Women Hospital, Kitengela and after that went home with the Complainant because it was late and she spent the night in PW2's home. In the morning they took the child to the police. It was his evidence that he did not talk to the complainant and he neither knew her family nor where she was living. She only saw the appellant in court for the first time.

14. PW4 (ought to have been PW5), **Winfred Musembi**, a clinical officer at Athi River Health Centre, treated the complainant at the Health Centre on 9th January, 2018. According to her the Complainant was 7 years old and reported that a person who was well known to her, around 6th January, 2018 went to their home, requested her to remove her clothes and touched her private parts with her fingers. Upon examination she found that the complainant had a foul smelling discharge and her hymen was broken. The urine test revealed an infection and she was placed on treatment. In her evidence the Complainant had been treated at Nairobi Women Hospital and PRC Form had been filled. By the time of the examination, the complainant had changed clothes since it was 2 days after the incident. He concluded that the complainant had been defiled and exhibited, the treatment card and the P3 form.

15. PW5 (ought to have been PW6), **PC Joshua Kiio**, attached to Lukenya AP Post at about 7.30pm on 9th January, 2018 received a report from a member of the community policing, one **Mutua Makau**, that there was a couple that was subjecting their child to torture as the father was defiling her 8 year old daughter and the mother would threaten her whenever she reported the incident. According to the report he received, the report had been made at Athi River Police Station and the child had been treated and they wanted him to arrest the suspect. In the company of other officer, he proceeded to Kilili Shopping Centre where they were shown the father and the mother of the child both of whom they arrested outside their house and took them to Athi River Police Station. It was his evidence that the appellant was one of the persons they arrested and that prior to the report, he did not know the *Nyumba Kumi* Initiative members. However, at the time of the arrest the child was not at home.

16. PW6 (ought to have been PW7), **Hadija Chege**, also known as **Njeri** a volunteer for CLAN (Children Legal Aid Network) and also a member of *Nyumba Kumi* on 5th January, 2018 received a call from PW2 regarding defilement. They met at Kilili Centre where PW2 gave her the information and she promised to follow up the matter. The following Monday, in company of other members, they went to [Particulars Withheld] Primary School, Lukenya and along the way they found the complainant who had been sent home to call a parent. Together with the child, they proceeded to the school and the head teacher handed over the child to them and they went to Athi River Police Station from where they were referred to Nairobi Women Hospital, Kitengela.

17. Upon interrogation, the child informed PW6 that when she remained with the father at home, the father would remove her clothes and defile her and whenever she reported to the mother, she would be beaten by the mother. After being treated the child was handed over to her

but she requested that she should not be taken back to her home for fear of being beaten. On Tuesday, she took the child to Athi River Hospital where she was treated after which she took her to a Children's Home. According to PW6, the child had a problem since she was unable to control her urine.

18. It was her evidence that she did not know the child's parents by their names and that their hose was less than one kilometre from hers and they had stayed there for about a year. On Tuesday, the appellant went to *Nyumba Kumi* and asked for the child after introducing himself as the father of the child and that was the time that PW6 saw him.

19. PW7 (ought to have been PW8), **John Mugina**, a clinical officer at Nairobi Women Hospital was called to identify the PRC Form filed in by his former colleague who had since left the Hospital. According to the report filed in on 8th January, 2018, the victim was the complainant, PW1, who was born in 2011. According to the report, the complainant was defiled by her father who broke her hymen using his finger. Upon examination, the genitalia were normal with a foul smelling discharge though the hymen was not intact. A high vaginal swab revealed a few pus cells and the urine had epithelial cells. The conclusion was that the complainant had been defiled.

20. Upon being placed on his defence, the appellant in his sworn evidence simply stated that he was arrested on 4th January, 2018, he was arrested for undisclosed reasons since he did not commit the act.

21. In cross-examination, he admitted that the complainant was their only biological child and that the three of them were living in the same house. He however stated that the complainant had a problem as she did not want to go to school and that he went to school over her conduct. In his evidence, PW3, **Pauline Wambua**, was not their neighbour but he knew her. He disclosed that there was a grudge between the two of them and that they had disagreed almost three days before the alleged incident. He however had no problem with either PW4, **Francis Kyule** or **Esther Njeri**, PW7.

22. In her judgement, the learned trial magistrate found that since there was no dispute that the appellant was the father of the complainant, the appropriate charge ought to have been incest though there was nothing wrong with charging him with defilement. She found that based on the evidence, an act of penetration of the complainant's genital organ occurred and this was by insertion of either a finger or male genital organ or both into her vagina. She found that the complainant and the appellant knew each other very well and the complainant struck her as a credible witness and had no reason to falsely accuse her father of the act. She was therefore satisfied that the complainant properly identified the appellant as the perpetrator.

23. Based on the evidence on record, the learned trial magistrate found that penetration was by a finger and hence constituted the offence of sexual assault, a lesser offence than defilement. Pursuant to section 179 of the ***Criminal Procedure Code***, she found the appellant guilty of the offence of Sexual Assault contrary to section 5(1)(a)(i) as read with section 5(2) of the Sexual Offences Act and convicted him accordingly. She ten considered the mitigation and sentenced him to serve 10 years in prison.

24. In this appeal, the appellant submits that the prosecution's evidence was contradictory and inconsistent as regards the period when the incident occurred. The appellant also took issue with the fact of the defilement considering the complainant's evidence that she was lying facing down when the defilement took place. It was submitted that the identification of the culprit was not free from error as the incident only occurred once and at night when the only source of light was a candle. It was further submitted that the evidence of penetration was insufficient as the same was speculative and was not proved beyond reasonable doubt. The appellant also took issue with *voir dire* examination and the conclusion by the trial court that the complainant had sufficient knowledge to speak the truth. An issue was also taken with regard to the failure by the prosecution to call the said anonymous witnesses who relayed the information to the other witnesses. The appellant sought that his appeal be allowed, his conviction be set aside and his sentence be quashed and he be set at liberty

25. In response to the Appeal, it was submitted by **Mr Ngetich**, Learned Prosecution Counsel, in a nutshell that the prosecution proved the age of the complainant, that there was penetration and that the penetration was by the appellant. He also submitted that the *voir dire* examination was properly conducted and that the learned trial arrived at the right decision as regarding the truthfulness of the complainant. He prayed that the appeal be dismissed.

Determination

26. This is the first appellate court as far as this appeal is concerned. It is therefore not only expected but is legally enjoined to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

27. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

28. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

29. The facts of this case are, according to the complainant, PW1, that sometimes in December, 2017, she was from school when she found the appellant, her father alone at home, her mother having gone for work. The appellant then told her to lie on the bed and remove her clothes. The appellant proceeded to remove his clothes ad inserted his fingers into her vagina. He also inserted his penis into her vagina. During these occurrences the complainant felt pain. Though the complainant disclosed the incident to her mother, her mother instead rebuked her and threatened her.

30. This information was disclosed to PW3, **Pauline Kalimbe Wambua**, a member of community policing by one Mama Slay who unfortunately was not called to testify. PW3, also informed PW7, a member of community policing and also a volunteer for CLAN (Children Legal Aid Network). The duo accompanied by other members of the initiative reported the matter to the police and also took the complainant for treatment. The appellant was then upon the information obtained from the complainant arrested and charged after the medical examination concluded that the complainant had been defiled. In his evidence, the appellant simply denied that he committed the offence.

31. Section 5(1)(a) (1) and (2) of the ***Sexual Offences Act*** under which the appellant was convicted provides as follows:

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

32. This provision was the subject of the determination in **John Irungu vs Republic (2016) eKLR** where the Court of Appeal expressed itself as hereunder:

"Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

33. In this case, though there was testimony that the appellant used his genital organs to penetrate the genital organs of the complainant, the medical report showed, as correctly found by the learned trial magistrate that penetration was in fact by use of fingers.

34. The medical examination revealed that when PW1 was examined, it was found that PW1's hymen was broken and there was smelly foul discharge. The results of the test revealed that pus cells a sign of infection. It was however not found that the infection was as a result of penetration by the male genital organs and it was not ruled out that such infection could not have been caused by the forceful break in the hymen of the complainant by the fingers of the appellant.

35. It is true that the mere fact that the hymen is broken does not conclusively prove penetration unless there is evidence that the breaking of the hymen was caused by the act of the accused person. As appreciated by the Court of Appeal in **P.K.W v Republic [2012] eKLR:**

"15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an

erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.

17.In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently we have no option but to give the appellant the benefit of doubt.

18. Taking all these factors into account, especially the fact that the Appellant had a sour relationship with the child's mother, we believe the evidence of DW2 that the child confessed she was cajoled by her mother to lie against the Appellant. We therefore allow this appeal, quash the conviction and set aside the sentence of life imprisonment. We direct that the Appellant be set free forthwith, unless otherwise lawfully held."

36. In this case though the only evidence on the act was that of the complainant, the complainant maintained her testimony even in cross-examination and her evidence was not shaken at all.

37. It is contended that the evidence of the prosecution was inconsistent and contradictory. The Court of Appeal in ***John Nyaga Njuki & Others vs. Republic Nakuru Criminal Appeal No. 160 of 2000 [*2002] 1 KLR 77; *[2002] eKLR*** *dealt with the issue as follows:*

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

38. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

39. In **Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007** the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

40. In **Erick Onyango Ondeng' v Republic [2014] eKLR**, the Court of Appeal held that:

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. *(See OKENO VS REPUBLIC (1972) EA 32*). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

41. As was noted in **Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:**

> **"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."**

42. In **Joseph Maina Mwangi vs. Republic CA No. 73 of 1992** (Nairobi) **Tunoi, Lakha & Bosire JJA** held: -

> **"In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."**

43. Whereas I appreciate that there were minor discrepancies in the evidence of the witnesses it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence*** **(10th Ed) Vol. 1 at 46**

44. In **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR** it was held that:

> **"As regards contradictions in the prosecution's case, other than the fact that the appellants did not point out any specific contradictions, this Court has consistently stated that because discrepancies are bound to occur in evidence; the critical question is always whether the discrepancies are minor and inconsequential or whether they are material so as to vitiate the prosecution case. (See for example *Joseph Maina Mwangi v. Republic, CR, APP No. 73 of 1993, Kimeu v. Republic (2002) 1 KAR 757* and *Willis Ochieng Odero v. Republic [2006] eKLR)*…In this appeal, we are satisfied that there were no discrepancies of the nature that would have created doubt and vitiated the prosecution case."**

45. The same Court in **David Rotich & Another vs. R. Nakuru Court of Appeal Criminal Appeal No. 75 of 1999** held that:

> **"We notice form the record that except for one, all the statements recorded by the police were made by the witnesses in the English language. In court, it is apparent most of them gave evidence in Kipsigis, their mother tongue. It appears to us that what the police did was to record the statements in English while the witnesses might well have spoken to them in either Swahili or Kipsigis languages. We are unable to place any importance on the witnesses' police statements. In any case, those statements were before the trial court and the Judge and the assessors must have seen them, or had them brought to their attention. They still believed the evidence of PW1 and PW2 and there is no law, as far as we are aware, that where a witnesses' statement recorded by the police is in conflict with the evidence given by the witness in court, the evidence must of necessity be disbelieved. We have gone through the cross-examination of PW1, for instance, and we are unable to find any place at which PW1 was asked to explain the discrepancy between his police statement and his evidence in court. As we have said we do not think that the Judge and the assessors were wrong in believing the sworn testimonies of PW1 and PW2…The fact that one witness says he did not see another witness at the scene of crime does not and cannot mean the witness allegedly not seen was in fact not there. Both PW1 and PW2 were clear in their evidence that they saw these two appellants assaulting the deceased…Having looked at the whole of the recorded evidence, we are satisfied that these two appellants were correctly convicted. To be sure, there were some discrepancies in the evidence of the prosecution witnesses, but we agree with Mr Onyango Oriri, for the Republic, that the discrepancies pointed out did not go to the root of the prosecution's case. Indeed, they were the sought of discrepancies one would expect from unsophisticated village witnesses trying their best to recall events which took place some two years ago. Like the Judge and the assessors, we are ourselves satisfied, having independently examined the recorded evidence, that the witnesses for the Republic were basically honest and their evidence proved the charge against the appellants beyond reasonable doubt."**

46. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

> **"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."**

47. This was the position in **Willis Ochieng Odero vs. Republic [2006] eKLR,** where the Court of Appeal held:

> **"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."**

48. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any

part of his testimony. (**Nyakisia v. R**. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry v. P. & Lutta J. A., in the East African Court of Appeal).

49. I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

50. As regards the manner in which the *voir dire* examination was conducted, it is now settled that failure to observe the provisions as to *voir dire* does not automatically vitiate the conviction. See Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR** where it was held as follows:

> **"We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014. Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. Voir dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary. But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; ".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence" (our emphasis)**
>
> **Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006.**
>
> **It is clear to us from the record that the trial Magistrate deliberately did not conduct voir dire examination for he believed, erroneously, that the complainant was not a child of tender years. The record reads thus;**
>
> **"PW1 F/c (Female child) not of tender years sworn states in Kiswahili." The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. 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. Appeal No.11 of 2015**
>
> **On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voir dire examination. The complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated**

the fact of defilement.c

51. In this case *voir dire* examination was duly conducted and it is my view that the learned trial magistrate directed herself properly when she found that the complainant was possessed of sufficient intelligence and understood the solemnity of an oath and was accordingly sworn.

52. An issue was also taken as regards the failure to call some people who ought to have been called as witnesses. However, section 143 of the ***Evidence Act*** provides that:

> **No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.**

53. The prosecution is therefore not duty bound to call all persons involved in the transaction and his failure to call them is not necessarily fatal unless the evidence adduced by him is barely sufficient to sustain the charge. In **Keter vs. Republic [2007] 1EA135** the court was categorical that:-

> **"The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

54. In this case, it was not contended that the people who it is alleged ought to have been called witnessed the incident. In fact, according to the complainant there was no one else present during the incident. Therefore, nothing would have turned on their evidence even if they had been called.

55. In this case the complainant was the daughter of the appellant. She knew the appellant well. According to her, when she returned home, she found the appellant in the house. The appellant told her to removed her clothes and lie on the bed. In those circumstances I cannot see any possibility of mistaken identity. It was alleged that since the complainant lay face downwards, it was not possible for her to be defiled. However, the trial court found that the penetration was by use of the appellant's fingers. I do not understand the appellant to say that it is impossible for penetration to take place by use of fingers to take place unless the victim is facing upwards.

56. Although the appellant alluded to bad blood between him and PW3, it is clear that the matter was not instigated by PW3. There was no allegation of bad blood between the appellant and the complainant save for the allegation that the complainant did not want to go to school. Dealing with similar circumstances the Court in **Tito Kariuki Ngugi vs. Republic [2008] eKLR** expressed itself as follows:

> **"I am satisfied and I agree with Mr. Mugambi that the allegation of a frame up is an afterthought. The Appellant's own daughter especially did not have any reason to frame up her father."**

57. The medical evidence clearly revealed that there was penetration of the complainant's genitalia. While there was doubt as to whether the penetration was caused by the appellant's male genital organs or his fingers, what was required was evidence that the complainant's genitalia was penetrated by any part of the body of the appellant which is what the trial court found.

58. Having considered the material placed before me, I find that there is no basis for interfering with the decision made by the trial court. In the premises, I find no merit in this appeal which I hereby dismiss.

59. However, as the appellant was arrested on 9th January, 2018 and did not enjoy the benefit of being released on bail. The said sentence shall be computed from 1st January, 2018 pursuant to section 333(2) of the ***Criminal Procedure Code***.

60. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2021

G. V. ODUNGA

JUDGE

In the presence of:

The Appellant online

Mr Ngetich for the Respondent

CA Martha