REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 19 OF 2007

JOHN MWALUKO MWANGA....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable P. N. Gesora- Ag. SRM dated 4th April, 2007 in Tawa SRM's Court Criminal Case No. 85 of 2007)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

JOHN MWALUKO MWANGA.....ACCUSED

JUDGEMENT

1. This appeal has a chequered history. The appellant, **John Mwaluko Mwanga**, was charged in the Tawa SRM's Court Criminal Case No. 85 of 2007 with the offence of defilement contrary to 8(1) as read with section 8(2) of the ***Sexual Offences Act, No. 3 of 2006*** the particulars being that on diverse dates between 6th August, 2006 and 3rd December,, 2006 at Kyangóndu [particulars withheld], Wara Location in Makueni District within the Eastern Province, the Appellant intentionally and unlawfully had carnal knowledge of **MM**, a child aged 11 years. He faced the alternative charge of indecent act with a child contrary to section 11(1) of the same Act the particulars being that during the said period, the appellant intentionally and unlawfully did an indecent act to the said **MM** by touching his private parts.

2. After hearing the evidence, the learned trial magistrate found the appellant guilty in the said main count and convicted him accordingly. He proceeded to sentence the appellant to 20 years imprisonment on 4th April, 2007.

3. He appealed to this Court and on 17th November, 2008, this Court (**Lenaola, J** as he then was), summarily rejected his appeal. Undeterred, the appellant appealed to the Court of Appeal in Nairobi Criminal Appeal No. 369 of 2008 and on 27th September, 2013, the order rejecting the appeal summarily was set aside and it was directed that his appeal be heard and determined on its merits.

4. In support of its case before the trial court, the prosecution called 7 witnesses. The prosecution's case in summary was that in 2006, the appellant was an employee in the complainant's home doing domestic duties. One Sunday at noon in August, 2006, the appellant called the complainant sister and brother and sent them to go to the *shamba* to pick some oranges leaving the complainant and the appellant behind. The appellant then called the complainant into his bedroom and when the complainant entered he closed the door, removed his trousers, held the complainant tightly, took her to his bed, removed her inner pant and dress and had carnal knowledge of the complainant. When he was done, he promised to buy the complainant *mandazi* which he did at the market when he was escorting her to school. After the act the appellant wiped and cleaned the complainant and there were no traces of blood or urine. The following Sunday, the appellant similarly sent the complainant's siblings to the *shamba* and had removed her inner pant when the complainant's mother arrived, called the said siblings and inquired where the complainant was. Upon being informed that the complainant was at home, she knocked the door and found that she had been locked therein. The appellant then opened the door and when asked what he was doing with the complainant replied that there was nothing and that he wanted to take his clothes and go to church. The complainant then explained to her mother that the appellant had asked

her to remove her inner pant but did not disclose the other details.

5. When her mother was taken ill and was taken to the Hospital by the complainant's father, the complainant was left with the appellant in the house though they used to sleep in different rooms. One night the appellant went to her bed, took the complainant to his room and once again had carnal knowledge of her after which he returned her to her bed asking her not to tell anybody. At that time the complainant's siblings were asleep. According to the complainant, the appellant did the same act on four different occasions at night when her mother was away.

6. On 3rd December, 2006 when they went to cultivate the *shamba*, the appellant made sexual advances to her but she declined telling him that there was pus coming from her private parts. The appellant then reported to **RK**, PW2, in whose care the complainant had been left that the complainant was unwell. Upon being asked by the said Rose what was ailing her, the complainant disclosed to her how the appellant had been defiling her. PW2 then observed her private parts and reported the matter to one **JK**, PW3, who reported the incident to the Chief's Office, Kyangondu. When asked by the police the appellant denied. The complainant later went to the police station and was taken to Kisau Health Centre where it was confirmed that she had been defiled and the appellant was arrested after she recorded her statement. She identified the clinic card showing that she was born on 26th July, 1995 and the P3 form.

7. In cross-examination she denied that she had been couched and stated that no one saw the appellant defiling her since the offence was committed in the night between 10-11 pm when her siblings were asleep or having chased them away.

8. Pw2, **RMK**, testified that she knew both the complainant and the appellant as well as the complainant's parents who were her neighbours. The appellant was also a neighbour who in 2006 was employed at the complainant's father's home. Towards the end of 2006, PW2 was called by the complainant's parents who informed her that the complainant's father was taking the complainant's mother to the Hospital in Kitui and PW2 was asked to look after their children including the complainant by buying them food and taking care of their welfare.

9. On 3rd December, 2006, the appellant informed her that the complainant had pus coming from her private parts. Upon calling the complainant, the complainant confirmed to her that that was true and that it had been happening for a month after the appellant had carnal knowledge of her. On overserving the complainant's private parts, PW2 confirmed what she had been told. She then reported the matter to the complainant's aunt, PW3, who came the following day and also confirmed the report after which she reported the matter to the chief's office. Thereafter the appellant was arrested by the Administration Police Officers and they went to Mumbuni Police Post where they made the report after which the complainant was referred to the Hospital where she was treated and a P3 Form filled. According to her, the complainant revealed her sickness when the appellant made sexual advances to her. It was her evidence that when the complainant's mother was admitted in Hospital, the appellant was sleeping in the same home as the complainant and that the complainant named the appellant as her assailant and disclosed to her that the act had been going on from August till November, 2006.

10. On 3rd December, 2006, PW3, **JMK**, the complainant's aunt was at her home when PW2 went and informed her that the appellant, an employee at PW3's brother's home, had reported to PW2 that the complainant had sustained injuries in her private parts and that pus was coming out. PW2 told her that she had called the complainant and observed her.

11. The following day, 4th December, 2006, PW3, went and observed the complainant after which they went to Kyangundo Chief's Camp. They were then accompanied by police officers and the appellant was arrested though he denied having committed the offence. They then went o Mumbuni Police Post where the matter was reported and they were referred to Kisau Health Centre where it was confirmed that the complainant had been defiled and a P3 Form was filled in for the complainant. The appellant was also examined at the said Health facility and was found to be suffering from the same disease as the complainant.

12. PW4, **JMM**, the complainant's mother testified that the appellant was her employee in 2006. She recalled one Sunday in August, 2006 she was on her way to church when she realised that she forgot something and returned home. On reaching there she found only her two children picking oranges and they told her that the appellant had sent them to do so. Shen then went home and knocked the door to the house and when the appellant opened, she found the complainant there. When she asked what they were doing there, the appellant informed her that he was changing clothe so that he could go to church but was evasive about the complainant's presence therein. Simil arly, the complainant did not disclose to her what she was doing there. As she was a bit sickly, she never went to church and the appellant left and went away.

13. In November her health deteriorated and her husband took her to a hospital in Kitui where she was admitted till December and left her children at home. On her return she found the appellant absent and was informed by her son that he had been arrested after he defiled the complainant. According to PW4, the complainant was born on 26th July, 1995 based on the clinic card which she exhibited. It was her evidence that though the appellant used to sleep in the same home as her children, she had asked PW2 to take care of their welfare.

14. On 4th December, 2006, PW5, **APC Paul Githinji**, who was attached to Waiya Chief's Camp, Kisau Division received a report from PW2 and PW3 that in the months of August to December, 2006 the applicant had carnal knowledge of the complainant. He then accompanied them to the home and on arrival they found the appellant in the *shamba* and upon interrogation he denied the allegations. However, PW1 disclosed that the appellant had defiled her severally between the said months and because the appellant promised her goodies in the form of *mandazi* and *chapatis* hence she never reported the incidents. PW5 then arrested the appellant and took him to Mumbuni Police Base. He was informed by PW2 and PW3 that they had observed the complainant's private parts. The complainant was then referred to Kisau Health Centre where she was examined and a P3 Form filled. Similarly, the appellant was examined.

15. PW6, **PC Pius Ndeti Mutisya**, rearrested the appellant and issued the complainant with a P3 Form which was filled in at Kisau Health Centre. He then investigated the case and charged the appellant who was also examined.

16. PW7, **Eric Killu**, a clinical officer in charge of Kisau Health Centre on 4th December 2006 filled a P3 Form for the complainant. He also examined the appellant and filled a P3 form for him. According to him the complainant's state of clothing was clean but had a medical history of defilement on unspecified dates between August and November, 2006. She was in fair general condition and on examination, the

she was around 11 years. PW7 did not however notice any tear of the labia majora or minora but had whitish vaginal discharge on doing specula test. She had pus ns yeast cells when urinalysis was done. Upon examining the appellant it was found that he had normal genitalia and urinalysis confirmed that he had pus cells. In his opinion there was possibility that both the complainant and the appellant had corresponding venereal disease.

17. Upon being placed on his defence, the appellant opted to make an unsworn statement. According to him, he was employed as a home help at the home of the complainant's father on 7th February, 2006 and worked there till November, of that year. In August, 2006 there were allegations that he was defiling the complainant but he was never sacked and continued working despite the fact that he was never paid his salary. He was however arrested towards the end of November when he demanded for his money. It was his evidence that he framed in the charge herein.

18. In this appeal, the appellant contends that the *voir dire* examination of the complainant was not properly conducted as she was not asked whether she understood the meaning and solemnity of the oath. His submission was based on the case of **Johnson Muiruri vs. Republic [1983] KLR 445**, **Joseph Opando vs. Republic Cr. App. No. 91 of 1999**, **Patrick Wamuyu Wanjiru vs. Republic Cr. App. No. 6 of 2009** and **R. vs. Lal Khan [1981] 73 Cr. App R 190**.

19. According to the Appellant, the medical evidence was inconclusive since there is no evidence that any P3 Form was filled for the appellant by PW7. According to the Appellant it was not recorded in the said P3 Form that the appellant was suffering from the said venereal disease and the said P3 Form was never produced in court. In any case PW7 only stated that there was a possibility that the appellant was suffering from the same disease.

20. It was further submitted based on **Christopher Ochieng vs. R [2018] KLR**, **Evans Wanjala Wanyonyi vs. Republic [2019] eKLR**, that mandatory minimum sentences are unconstitutional. The appellant further submitted that the fact that the complainant consented to the alleged offence is a mitigating factor which the court ought to consider. The Court was urged to consider acquitting the appellant taking into account the 12 years that the appellant has been in custody.

21. In opposing the appeal on behalf of the Respondent, it was submitted by **Ms Mogoi**, learned prosecution counsel that through the clinical card, it was proved that the complainant was a child having been born on 26th July, 1995. It was submitted that based on the evidence of the complainant, PW4 and PW7, the element of penetration was proved beyond reasonable doubt. On identification, it was submitted that since the appellant was employed by the complainant's parents, he was well known to the complainant and the first time the offence was committed in broad daylight.

22. It was submitted that *voir dire* examination was properly conducted and that the appellant's defence was a mere denial that did not create any doubt in the prosecution's case. According to the learned prosecution counsel, the decision of the learned trial court was well reasoned and supported by evidence.

23. It was submitted that since the appellant was given an opportunity to mitigate which mitigation was considered the directions given in the ***Muruatetu Case*** do not apply to the instant case. The Court was therefore urged to uphold the conviction and confirm the sentence.

Determination

24. I have considered the evidence on record as I am duty bound to do. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.** I have also considered the submissions made by the parties herein.

25. In this appeal, the appellant contends that *voir dire* examination of the complainant was not properly conducted as she was not asked whether she understood the meaning and solemnity of the oath. The Court of Appeal gave its guidance on the issue of *voir dire* examination in **Johnson Muiruri vs. 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.**
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> **In *Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported) we said:***
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> > **"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).**
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> > **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."**
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> **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."

26. In this case the complainant in *voir dire* examination stated that she knew the reason why she was in court and that she would speak the truth otherwise she would be punished. Based on that, the learned trial magistrate concluded that the complainant understood the purpose of her attendance in court and also knew the importance of speaking the truth on oath. With due respect to the learned trial magistrate, the answers elicited from the complainant did not meet the threshold for taking her evidence on oath.

27. As stated above, when a court 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. What 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. In other words, it is not enough that the child understands the importance of telling the truth. He or she must also have appreciated the solemnity of the occasion and what the taking of the oath entails. In this case I am not satisfied that the two conditions precedent necessary for swearing the complainant were fulfilled.

28. However, as was held by Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR**:

"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."

29. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

30. In this case, there was sufficient evidence both oral and documentary that the complainant was aged 11 years at the time of the incident. Similarly, there was ample evidence that the appellant was well known to the complainant as he was an employee in the family of the complainant.

31. As regards penetration the evidence was that there was a whitish vaginal discharge and the complainant had pus and yeast cells. Section 2 of the ***Sexual Offences Act*** provides that:

> **"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;**

32. This was explained in the case of **George Owiti Raya vs. Republic [2013] eKLR** where it was held:-

> **"There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia... it remains therefore that there can be penetration without going past the hymen membrane."**

33. Accordingly, there was penetration as defined by law.

34. Was the penetration by the appellant? As stated hereinabove the appellant was well known to the complainant.

35. Therefore, while the taking of the complainant's evidence on oath was not necessarily fatal, it is my view that her evidence required corroboration. On the issue of whether the evidence of a minor requires corroboration, the law is quite clear: it does.

36. In this regard the Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR** stated that:

> **"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."**

37. Similarly, in **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal was of the opinion that:

> **"The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:**
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> > **'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'**
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> **The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8 page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124."**

38. It follows that as a matter of practice, corroboration is necessary in sexual offences. However, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. The fact of the warning must appear in the judgement of the trial court.

39. What then is corroboration? The meaning of corroboration as defined or stated in the Nigerian case of **Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108** is thus:-

> **"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".**

40. In **Mukungu vs. Republic [2002] 2 EA 482**, the Court of Appeal citing **Mutonyi vs. Republic [1982] KLR 2003**, held that:

> **"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."**

41. In **R vs. Kilbourne [1973] 2 WLR 254, 267**, **Lord Hailsham** of St Marylebone LC stated:

> **"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed."**

42. In **Khalif Haret vs. The Republic [1979] KLR 308, Trevelyan** and **Hancox, JJ** pronounced themselves as hereunder:

> **"What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."**

43. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the

crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. In this case the only evidence that could have connected the appellant with the offence with which he was charged would have been the results of his medical examination. It is however unfortunate that the alleged P3 form which was filled after his examination was never exhibited leaving a doubt as to whether in actual fact there was such examination in the first place considering the evidence of PW7 that "there was a high possibility that both had venereal diseases which corresponded." Proof in criminal cases is beyond reasonable doubt rather than on possibilities. That was the position in the South African case of ***Ricky Ganda vs. The State [2012] ZAFSHC 59,*** a decision of the Free State High Court, Bloemfontein *cited in* ***Philip Muiruri Ndaruga vs. Republic [2016] eKLR*** *stated as follows:*

> **"The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt…To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him…"**

44. It is therefore my finding that there was no evidence or material that corroborated the complainant's evidence.

45. That however, is not the end of the matter. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."** [Emphasis added]

46. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** the Court held that:

> **"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."**

47. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

> **"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:**
>
> > **"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."**
>
> **The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."**

48. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

> **"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."**

49. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when

he stated that:

> **"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."**

50. In this case the learned trial magistrate found as a fact that the complainant gave detailed particulars of the incidents and having considered her demeanour in court found no reason to disbelieve her. Whereas, the trial court ought as much as possible state in express terms that it is satisfied that the child is stating the truth, there are no prescribed words as long as the court is clear in its mind that it believes that the child was stating the truth. One such instance would be where, as in this case, the court states that the child's evidence was credible since credible evidence must necessarily mean that the evidence is truthful. In **Keter vs. Republic [2007] 1EA135**, the Court held *inter alia* that:-

> **"Whether or not a witness is to be believed is a matter for the discretion of the trial court. Judicial discretion is based on evidence and sound principles. The practice of criminal law courts is that the trial magistrate or judge has to observe the demeanor and other factors to decide whether any particular witness is a witness of truth or not. There is no principle of law which entitles a court to disbelieve a witness merely because the witness is related to either the complainant or the accused."**

51. My understanding of the finding made by the learned trial magistrate though not as explicit as it ought to have been is that he believed that the complainant was telling the truth. I have on my part considered the evidence on record and I find no reason to disagree with that finding. While the appellant contended that he was framed because he demanded for his pay, the evidence on record reveals that the report was not made by the parents of the complainant, the appellant's employers, but by a person who was not related to the complainant after she was informed by the appellant himself that the complainant was unwell. Faced with not too dissimilar 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."**

52. Similarly, PW2 2 had no reason to frame the appellant. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan** and **Sachdeva, JJ** held that:

> **"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?"…The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful…There are spiteful people about."**

53. In the premises I find that the appellant was properly convicted.

54. As regards the sentence, the appellant's action was heinous. In this case, the appellant took advantage of the tender age of the complainant for his own selfish gratification. I am not convinced that this was a case in which it can be said that the complainant consented to the sexual intercourse as was suggested by the learned trial magistrate. The appellant took advantage of the complainant's innocence and duped her into the act. That cannot be termed as a consent. While I agree that there are occasions when a victim of sexual offence's conduct may be taken into consideration when it comes to sentencing, this was clearly not such a case. In **D W M vs. Republic [2016] eKLR** where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

55. In **Tito Kariuki Ngugi vs. Republic [2008] eKLR** the court held that:

> **"The Appellant…caused her trauma which she will have to live with for the rest of her life."**

56. This Court does not condone offences against minors and vulnerable persons. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

> **"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within**

the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

See also **Omari vs. Ali [1987] KLR 616.**

57. The Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** held that:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

58. In this case however the appellant was charged under section 8(1) as read with 8(2) of the ***Sexual Offences Act*** which provides as follows:

> **8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

59. There was evidence that the complainant was 11 years. In sentencing the appellant to 20 years and not life imprisonment, the learned trial magistrate must have considered the mitigating circumstances. In the premises I agree with **Ms Mogoi** that the decision in ***Muruatetu Case*** does not apply to the circumstances of this case.

60. In the premises the appellant's appeal on conviction and sentence fails and is dismissed. However, since the appellant was arrested on 29th March, 2007 and from the record was not released on bond, pursuant to section 333(2) of the ***Criminal Procedure Code***, the said period will run from 29th March, 2007. Based on this court's decision in **Sammy Musembi Mbugua & 4 Others vs. Attorney General & Another [2019] eKLR,** the appellant is entitled to remission of his custodial sentence if he qualifies due to good behaviour while serving his said sentence.

61. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 17th January, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr Kimani for Miss Mogoi for the Respondent

CA Geoffrey