IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 24 OF 2017

BETWEEN

PETER OSUMO .....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence dated 30th December 2015 in Criminal Case (SO) No. 3032 of 2014 at Kiambu Magistrates Court before Hon. J. Kituku, PM)

JUDGMENT

1. The appellant, **PETER OSUMO**, was charged with the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***") The particulars of the offence were that on 20th September 2014 at Githurai 44, Kasarani Division Within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of VN, a child aged 11 years.

2. The appellant was convicted for the offence of defilement and sentenced to life imprisonment. He now appeals against the conviction and sentence on the grounds set out in the amended memorandum of appeal dated 4th September 2019. The appellant contended that:

(i) The prosecution did not prove the case to the required standard as there was no evidence to support the charge.

(ii) The testimony of PW 1 was obtained through coercion.

(iii) The prosecution not only failed to call essential witnesses but it also failed to call material witnesses.

(iv) The prosecution case was full of contradictions and inconsistencies which could not support a conviction and,

(v) The entire trial was full of errors and material misdirection which resulted in a miscarriage of justice.

3. Mr Kasyoka, counsel for the respondent, supported the conviction and sentence. He submitted that all the evidence on record supported the conviction and that the prosecution proved all the elements of the offence.

4. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, I did not have the benefit of seeing the demeanour of the witnesses and the appellant during the trial and can therefore only rely on the evidence that is on record (see **Okeno v Republic [1972] EA 32).** In order to fulfil this duty, it is necessary to set out the evidence as it emerged before the trial court.

5. The prosecution relied on 2 witnesses to prove its case. PW 1 testified on oath and recalled that on 14th September 2014 her mother left her alone at home and went to Kisii. On 20th September 2014, when she was alone at home, the appellant who was her mother's friend, passed by the house. He gave her Kshs. 150/- for food. Since the appellant was deaf, he wrote her a note asking her if she was going to school, if her sister was sick and when her mother was coming back. She confirmed as much. As they were communicating through pieces of paper, the appellant kept moving close to her making her uncomfortable. When she moved to sit on the bed, the appellant held her hand and pushed her on the bed. He removed his jacket and started caressing her on the back and stomach. He removed her skirt, her tights as she tried to resist him. He removed his clothes and inserted his penis in her vagina. After committing the act of penetration, he left. PW 1 testified that she was so scared that she did not tell anyone.

6. PW 1 further testified that her mother came back at 4.00am. When her mother asked her who had come, she said no one but she confirmed the appellant had come and given her KShs. 150/- when her mother told her that the appellant's wife had informed her that the

appellant had passed by. The appellant came back to the house on 3rd October 2014 but did not find her mother. When her mother returned, she told her that appellant had come. She also told her mother what the appellant had done to her on 20th September 2014 after she was beaten. PW 1's mother called the appellant by SMS and he came. Her mother beat him and they all proceeded to the police station although, the appellant was beaten by members of the public before he could escape.

7. The second and final prosecution witness, PW 2, was a clinical officer working for a Non-Govenmental Organisation. She identified a medical certificate in respect of PW 1 and the Post Rape Care Form in respect of PW 1 which she produced in evidence. According to her conclusion there was no obvious injury on the genital area but there was a whitish discharge and a small notch injury to the hymen which had healed by the time PW 1 was examined on 3rd October 2014. She concluded that PW 1 had been sexually assaulted.

8. When put on his defence, the appellant denied the offence. He admitted that he knew PW 1's mother sent an SMS and told him that she was in Mombasa. She borrowed from him Kshs. 150 and asked him to give PW 1.

9. The first issue which I propose to deal with but which was not raised by the appellant that of the failure of the trial magistrate to conduct an examination of the child to determine whether she was intelligent enough and whether she understood the nature of the oath. The record shows that that the trial magistrate stated that the child was not of tender years hence he did not conduct a *voire dire* and proceeded to receive PW 1's testimony on oath before she testified.

10. According to the charge sheet the age of PW 1 was stated to be 11 years. The question of who is a child of tender years had been settled in this jurisdiction by the Court of Appeal for Eastern Africa in ***Kibageny Arap Kolil v R*** **[1959] EA 82** where it held that the phrase, *"a child of tender years"* meant a child under the age of 14 years (see also ***Patrick Kathurima v R*** **Criminal Appeal No.137 of 2014 [2015] eKLR** and ***Samuel Warui Karimi v R*** **Criminal Appeal No.16 of 2014 [2016] eKLR**). It was therefore important for the trial magistrate to establish as a preliminary matter to conduct a voire dire in order to receive her testimony as required by **section 19** of the ***Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)***;

> *19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.*

11. The requirement of a *voire dire* is not idle, it goes to the assessment of the nature and quality of evidence of a child and although failure to conduct one is not fatal, it is a factor to consider when assessing the evidence. On this issue the Court of Appeal in ***Maripett Loonkomok v Republic*** **MSA Criminal Appeal No. 68 of 2015 [2016] eKLR** observed as follows:

> *It follows from a long line of decisions that voire 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 voire 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 Vs-Republic Cr. Appeal No.11 of 2015.***

12. The appellant contended that essential witnesses were not called to give evidence particularly the mother of the child., the doctor who filled the P3 medical form and the investigation officer. The question is whether these witnesses were essential witnesses. The prosecution is not required to call any particular witnesses or a multiplicity of witnesses to prove a fact. What matters is not the quantity but the quality of witnesses **Section 143** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** states, *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact."* Further in ***Bukenya and Others v Uganda*** **[1972] EA 549**, the East Africa Court of Appeal held that that where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case.

13. It is not apparent from the record why the PW 1's mother was not called as a witness. She was an important witness and would rebut the appellant's defence that there was no grudge as the evidence shows that there was a relationship between her and the appellant. Further the appellant's case is that PW 1 was coerced into giving evidence against the appellant in this case since PW 1 admitted she was beaten by the mother. Only the mother would shed light on these issues and failure to explain why she was not called as a witness entitles the court to make an adverse inference which would tend to weaken the prosecution case.

14. While it is true that a case of defilement may be proved by the testimony of the child, the fact is that the police conducted an investigation and took the statements of other witnesses. In the circumstances of this case and for the reasons I have stated above, the appellant was entitled to test the evidence of those witnesses as they would probably have cast doubt on the prosecution case.

15. For the reasons I have given, I find that the appellant's conviction is unsafe. The appeal is allowed. The conviction and sentence are quashed. The appellant is set free unless otherwise held on separate warrant.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 16th day of JANUARY 2020.

R. N. SITATI

JUDGE

Ms Jiseve instructed by C. M. Ongoto and Company Advocates for the appellant.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.