REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO.15 OF 2019

DANIEL OTIENO ALIAS JAOTE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Bondo Principal Magistrate's Court Sexual Offence Case No. 12 of 2018

Hon E.N. Wasike, SRM)

JUDGMENT

1. The appellant **DANIEL OTIENO ALIAS JAOTE** was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 22.9.2016 at around 7.15 pm at [particulars withheld] village, Bar Chando Sub-location in Bondo Sub-county, intentionally caused his penis to penetrate the vagina of PAO. [full name withheld] a child aged 14 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 22.9.2016 at about 7.15 p.m at [particulars withheld] village, Barchando Sub-location in Bondo Sub-county within Siaya County, the appellant intentionally touched the vagina of PAO. a child aged 14 years with his penis.

2. The appellant denied both charges and the prosecution called 5 witnesses in a bid to prove their case. The appellant gave sworn testimony maintaining his innocence.

3. As a first appellate court, I am obliged to reexamine and reevaluate the evidence adduced before the trial court and arrive at my own independent conclusion bearing in mind the fact that I neither saw nor heard the witnesses as they testified.

4. Revisiting the evidence before the trial court, I first and foremost observe that the complainant was a minor aged about 14 years at the time the offence was allegedly committed against her in 2016. The appellant was arrested on 23/9/2016 a day after the alleged offence. He was arraigned on26/9/2016 but it was not until 26/2/2018 that a plea was taken.

5. The trial court record shows that 19th February 2018 Hon T. Cherere allowed an appeal by the appellant herein and send back the file to Bondo PM's Court for retrial of the appellant. This was vide Siaya HCCRA No. 139 of 2016.

6. What I therefore gather is that the appellant had allegedly pleaded guilty but he challenged the guilty plea on account that it was not unequivocal hence the order on appeal. Nothing much is disclosed by any of the parties to this appeal.

7. I further observe that although the complainant was aged 17 years old, no *voire dire* examination was undertaken by the trial court. Nonetheless, the complainant was not a child of tender years and therefore failure to conduct *voire dire* examination was not necessarily fatal to the prosecution case.

8. However, a witness whose evidence was supposed to corroborate the complainant's evidence, that is PW5 EA was sworn and she testified saying she was a class 2 pupil at [particulars withheld] Primary School. She said that she was a sister to PW1 the complainant but there is nothing to show that she was a minor or how old she was. No *voire dire* was carried out on her and if she was in Class two in 2018 October 9th, the question how old was this witness in September 2016 when the alleged offence took place?

9. Albeit the evidence of a victim of sexual offence need not be corroborated, I find it highly doubtful that a child who was in class 2 two years after the alleged , was competent to give evidence on oath without being subjected to **voire dire** examination to determine their competence to give sworn evidence and the meaning of telling the truth.

10. In addition, the trial court record does not show whether the witnesses who took oath were sworn by the Bible or the Quran or other religious persuasion. Nonetheless, section 21 of the Oaths and Statutory Declarations Act states as follows:

> ***"where on oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking the oath, no religious belief shall not for any purpose affect the validity of the oath."***

11. However, I further observe that the trial court record does not indicate the language in which the witnesses testified although interpretation was indicated as being ENG/KIS/DHOLUO. It is not indicated which witness testified in which of the three languages after being sworn.

12. In **FRANCIS KOIKAI KATIKENYA Vs REPUBLIC, CRIMINAL APPEAL NO. 280/2006,** the Court of Appeal held as follows:

> ***"A careful reading of Sections 197 and 198 Criminal Procedure Code, clearly shows that failure to show, demonstrably, the language used in Criminal proceedings, will, in an appropriate case, this being one, vitiate the trial. True, as Mr. Kaigai submitted, the appellant was given an opportunity to, and he cross-examined various witnesses. However, he faced capital charges and he stands convicted of the same. It may not be possible to fathom the extent of any prejudice that might have occasioned to him."***

13. On that basis alone, the Court of Appeal allowed the appeal.

14. In this case, the appellant utilized the opportunity he had to cross-examine the prosecution witnesses. However, that would not reverse the legal requirement imposed on the trial court, to indicate on the record the language spoken by the witnesses as they testified.

15. In **DEGOW DAGANE NUNOW Vs REPUBLIC, CRIMINAL APPEAL NO. 233 of 2005** (Unreported), the Court of Appeal said:

> ***"Of course there was, right from the beginning of the trial an interpreter be present in court; that is clearly shown in the record of the Magistrate. What is not shown throughout the record is the language in which the appellant or the witnesses addressed the Magistrate."***

16. The Court went further to state as follows in the judgment:

> ***"The provisions show that the question of interpretation of evidence to a language which an accused understands is not a matter for the discretion of the trial Magistrate. It must be done, and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak."***

17. Section 198 of the Criminal Procedure Code and Article 50(2) of the Constitution give to an accused person the right to be tried in a language he understands. The Court of Appeal in the above **DEGOW DAGANE NUNOW Vs REPUBLIC** case concluded as follows:

> ***"It is the responsibility of the trial courts to ensure compliance with those provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place."***

18. For the reasons stated hereinabove, the judgment, conviction and sentence imposed on the appellant by the trial court cannot be sustained. The trial was fatally defective. I would have ordered for a retrial but in my view, a retrial would not serve any useful purpose as the appellant has had two trials and has been in custody since 2016. In the interest of justice, I decline to order for a retrial and proceed to quash the conviction of the appellant and set aside the sentence imposed on him by Hon E.N. Wasike, SRM. Therefore unless otherwise lawfully held, the appellant is hereby set free forthwith.

Dated, Signed and Delivered at Siaya this 10th Day of February 2020

R.E. ABURILI

JUDGE

In the presence of:

Appellant in person

Mr Okachi SPPC for the Respondent

CA: Modestar and Brenda