REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HCCRA NO.15 OF 2019

ONESMUS KATUMBI KAEKE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. G.W. Kirugumi dated 22/05/2019 in Migwani SRMCR No. 1 of 2016.)

JUDGMENT

1. Onesmus Katumbe Kaele the Appellant was charged with the following offences:

Count I: Defilement contrary to section 8(1) (2) of the Sexual Offence Act No. 3 of 2006. Particulars being that the Appellant on diverse dates between the month of July and August 2016 in Migwani district within Kitui county intentionally did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of **NE** a child aged 8 years.

Count II: Committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that the Appellant on diverse dates between the month of July and August 2016 in Migwani district within Kitui county intentionally did an act which caused the contact of his male genital organ namely penis with female genital organ namely vagina of **NE** a child aged 8 years.

2. The record shows that plea was only taken on the main count and he pleaded not guilty. The matter proceeded to full hearing and he was convicted on the main count and sentenced to life imprisonment.

3. Being aggrieved by the judgment, he filed this appeal on the following grounds:

a. That, the learned trial Magistrate erred in both law and facts when accepting the evidence of Pw1 not knowing that the evidence was just gathered from her mother.

b. That, the learned trial Magistrate faulted in law and facts when he agreed with the evidence of Pw2, mother of Pw1 not knowing that the accused had a grudge with her and that's why she linked him with this serious case of her daughter.

c. That, the trial Magistrate erred in both law and facts by arriving at findings that the case of the prosecution was proved beyond reasonable doubt whereas the evidence testified on was not supporting such findings.

d. That, the learned trial Magistrate erred in law and fact when agreeing with the evidence of Pw4 investigating officer (I.O) not understanding that the case of sexual offence is a serious case which need fair investigation and thus this was not investigated in a standard manner and contradictory of the witness evidences.

e. That, the learned trial Magistrate erred in both law and facts when accepting the evidence in record of medical officer who was from Mwingi West Migwani sub-county hospital not knowing that the examination done by Pw4 was wrong and not matching with the charges of the case.

f. That, the learned trial Magistrate erred in both law and facts when he quashed out his *alibi* defence same with his defence witness testimony not understanding that his witness was Pw1's aunt and same cannot testify a lie evidence hence has no grudge with Pw1's parents.

4. The case before the trial court was that Pw1 (NE) a child aged 8 years and her sister H aged 2 years went to the home of DP to play with him since children had not gone to school that day. This was on 20/8/2016. Pw1's parents had gone for a funeral at Mutitu. The parents of DP are related to Pw1's parents and they are neighbors. DP's parents were the employers of the Appellant, and they too were not at home.

5. Pw1 and H found DP and the Appellant at home. The children played together until 12:00 noon. Thereafter they had lunch cooked by the Appellant. As they had lunch Pw1's brother arrived from tuition and joined them. The children continued to play until evening. They even took a bath at DP's place and had supper then went to sleep.

6. Pw1 slept with H on a bed while her brother slept with DP. It was while Pw1 slept that the Appellant removed her clothes and lay on her. He had removed his trouser too. She stressed that he just lay on her without doing anything and she never felt any pain. He had done this to her twice before this date, she said. When her mother came that night she appeared to have been asleep. This is reflected in her answers during cross examination. She was taken to the police then the hospital after she told her mother what the Appellant had done to her.

7. Pw2 **MK** is Pw1's mother. She testified that when she returned home at 8:55 pm after the funeral, she found no one there. The door was locked with a padlock. She went to her cousin's place to check on the children. After peeping at the window and door she knocked the door and the Appellant opened for her. She found the children asleep and when she uncovered Pw1, she found her without clothes yet she had worn a trouser and pant in the morning.

8. She then took the child H and Pw1 and left with the Appellant escorting them. She interrogated Pw1, who told her the Appellant had just removed her trouser but had not done anything else to her. She however told her that was the third time he was doing that to her. She later reported the matter to the police and took Pw1 to hospital for treatment.

9. In cross examination she said Pw1 walked home that night. She admitted having threated to beat Pw1 after she told her she had removed her clothes after being bitten by an insect. She denied framing the Appellant because of the issue of jericans.

10. No. **1267 PC Vivian Mbinya** was the investigating officer who was assigned the case on 23rd August, 2016. It was her evidence that Pw1 told her the Appellant had defiled her twice before the incident of 20/08/2016, which did not end up in a defilement. It was also her evidence that Pw1 had not reported what had been going on between her and the Appellant.

11. Pw4 **Dr. Christopher Wahinya** is the doctor who examined Pw1 and only attended court after several warrants of arrest had been issued against him. He said he examined Pw1 on 23/08/2016 which is the same day she had been treated. His findings were as follows:

- Pain when passing urine.
- Abdomen was soft and not tender
- Freshly torn hymen
- Lips of the labia were reddish and swollen
- HVS – showed pus cells
- There was yeast or fungal infection
- Syphilis was negative.
- Evidence of STI
- No blood.

Impression of defilement was noted

12. In cross examination he stated that a freshly torn hymen means it had been torn within the last seven (7) days. The report to the police was made on 22/08/2016 5:45 pm, as per the P3 form.

13. When placed on his defence the Appellant gave a sworn defense. He denied the charge saying he had been at his employer's place working all through on the alleged date of incident. He denied seeing Pw1 on 20/08/2016. He said he was tricked by Pw1's father to go and get a letter from the police station and that's how he was arrested. He wondered why he was not taken to hospital upon his arrest on 23/08/2016.

14. It was his evidence that Pw2 had wanted an affair with him but he refused hence the frame up. He also raised the issue of containers which Pw2 used to take and not return as a reason for the frame up. She had even threatened him and he reported the same to his employer.

15. His witness AP who was also his employer, stated that he was a good obedient, active employee who attended church. She stated that on 20/08/2016 she attended a wedding at Migwani leaving her husband and Appellant at home, she had assigned the Appellant duties. She returned at 5:30 pm and found them still there and she prepared supper.

16. The Appellant went to sleep at 9:30 pm. She confirmed that Pw2 would use her containers and not return them. That the Appellant reported to her that he had disagreed with Pw2 and she threatened him. She did not take action because she thought they were just normal disputes.

17. The Appellant relied on his written submissions. On ground one, he argues that Pw1 clearly said the Appellant had not done anything to her. He blamed the rift between him and Pw2 for the case he faced. On ground two he submits that Pw1 said she was not wearing clothes because she had been bitten by something. She only changed her story after being threatened by her mother (Pw2). He also submits that there

was a difference in the age of Pw1 as given by Pw2 and Pw4.

18. On ground three he submits that the issue of a grudge against him was not addressed by the court. He argues that the evidence of Pw3 clearly shows that she did not carry out proper investigations in this matter; but only relied on Pw2's evidence.

19. In respect to ground five he argues that the date of incident given by the witnesses is not consistent. On ground six he says; the evidence of Pw2 and Dw2 on their whereabouts on 20/08/2016 is contradictory.

20. Learned counsel for the Respondent Mr. Mamba made oral submissions. He contends that Pw1 was categorical that she spent her day at the Appellant's and the Appellant had slept with her. Pw2 said she found Pw1 naked, and the child told her what the Appellant had done to her. There is evidence of her age of eight (8) years through the immunization card. He further submits that there is evidence from Pw4 that the child had contracted syphilis and her hymen was broken.

21. Counsel further submits that Dw2's evidence did not support his defence of *alibi*. Further the court had considered his defence. He contends that since defilement had been proved, the life imprisonment sentence was lawful.

Analysis and determination

22. This is a first appeal and this court is guided by the principles set out in cases like **Okeno –vs- R (1972) E.A 32, and Simiyu & Anor (2005) I KLR 1992. In David Njuguna Wairimu –vs- R (2010) eKLR** the Court of Appeal stated thus;

> **"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."**

23. I have considered the evidence on record, the grounds of appeal and the parties' submissions. I find the issue falling for determination to be whether the prosecution proved its case against the Appellant beyond reasonable doubt. For a case of defilement to be established there must be proof of the following:

a. Age of the complainant (Pw1)

b. Whether there was penetration of Pw1's vagina.

c. Whether the Appellant was positively identified as the perpetrator.

a. Age of the complainant (Pw1)

24. Age in defilement cases is key given the fact that sentence under the Sexual Offences is pegged on age. Pw2 who is the mother to the complainant testified that Pw1 was born on 28th November 2008. She availed to the court her immunization card to prove that. The incident is alleged to have occurred on 20/08/2016. It means the child was seven (7) years and nine (9) months. Age was therefore proved through this official document.

b. Whether there was penetration of Pw1's vagina.

25. Pw1 who was the key witness was a child who was below the age of 14 years and so was a child of tender years.

26. Section 19 of the Oaths and Statutory Declarations Act provides that:

> **Evidence of children of tender years**
>
> **(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 of the Criminal Procedure Code (*Cap. 75*), *shall be deemed to be a deposition within the meaning of that section*"**

27. Under section 19 of the Oaths & Statutory Declarations Act where a child of tender age is called as a witness in a proceeding there are two things the trial court must be satisfied about, namely;

i. Whether the child understands the nature of an oath, or

ii. If the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient

intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

28. The Court of Appeal in the case of **Maripett Loonkomok –vs R (2016) eKLR** 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 voire dire is not administered or is not administered properly the entire trial would be vitiated. This court sitting at Nyeri has recently reiterated 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 –vs- R, Criminal Appeal No. 10 of 2014"**
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> **…….……..……..…….**
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> 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 –vs- R (1959) E.A 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. This court has recently in **Patrick Kathurima –vs- R, Criminal Appeal No. 137 of 2014** and **in Samuel Warui Karimi –vs- 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. 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;
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> **"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."**
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> See **Athumani Ali Mwinyi –vs- R Criminal Appeal No. 1 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;
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> 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. A trial court can only make the above determination after conducting a voire dire examination on the child witness of tender years. In the instant case no voire dire examination was conducted. The record shows that Pw1 gave unsworn testimony, and was cross examined by the defence counsel. That still makes her evidence of probative value since it was challenged through cross examination.

30. A summary of Pw1's evidence is to the effect that the Appellant just lay on her naked body. He did nothing else and she did not feel any pain. He had done this to her two times before the 20/8/2016. At no point whether in her examination in chief, cross examination or re-examination does she say the Appellant placed his penis inside of her vagina.

31. Coming to Pw2, she did not witness anything in respect to this incident when she peeped through the window and door. All she saw was some light and nothing more. She did not also say that when she knocked the Appellant took time before opening the door. He just opened for her. She found them all in the sitting room but Pw1 was under a blanket and she was naked. It's while on the way that Pw1 told her what had happened. This was on 20th August, 2016.

32. Pw2 confirmed that Pw1 walked from Dw2's home to their home that night. She did not witness any discomfort or any problem in the walking style of this child. Even when they reached home she did not check or examine the child to confirm for herself what pw1 had told her or anything more.

33. She still took her time. The treatment card EXB3 shows that it was not until 23/08/2016 that Pw1 was taken for treatment. On the other hand, the P3 form (EXB2) shows that a report to the police was only made on 22/08/2016 at 5:45 pm. There is no reason given for this delay in taking the necessary action. It means Pw2 could stay with a small child aged eight (8) who had allegedly been defiled for three (3) days before reporting and taking her to hospital? Is that normal?

34. Pw4 **Dr. Christopher Wahinya** who appears (*from the signature*) to have been the one who treated the child (EXB3); filled the PRC form (EXB1) and filled the P3 form (*EXB*2) and all done on 23/08/2016 found the child to have been defiled. He says the hymen was freshly torn and the child had contracted an STD and had discharge and pus cells, with swollen labia majora and minora.

35. Humanly speaking the picture painted by Pw4's report is one of a child who was in dire need of medical attention. Inspite of the freshly torn hymen, she had no bleeding in the vagina. She was also not taken to hospital until after three days. The doctor said this child was in real pain when urinating and on a touch of her labia. Pw1 did not mention any of these things in her evidence. Her mother (Pw2) did not observe any of these unless she just did not bother to check.

36. From the above narrative, it is very clear that the evidence of Pw1 (*who did not go through a voire dire examination*) is at variance with

the evidence of the doctor (Pw4). One of them MUST have been very mean with the truth. I have noted with dismay that this witness (Pw4) was summoned to court severally with even warrants of arrest being issued against him. The OCS Migwani was even summoned to attend court and personally avail him.

37. When the OCS appeared in court on 18th July, 2018 he told the court that Pw4 had evaded arrest. The doctor was fined Kshs.100,000/= in default three months imprisonment. He paid the fine on 25/07/2018. When his findings are examined against the evidence of Pw1, and his own conduct, I find it not to be evidence to be relied on by this court.

38. Secondly, if indeed Pw1 was infected with an STD, and the Appellant was arrested on 23/08/2016 the same day of Pw1's treatment and examination, why did Pw3 (*the investigating officer*) not find it prudent to have him examined and tested for the said syphilis or STD? Pw3 said she accompanied Pw1 to the hospital. She must have seen the P3 form and the results in it. Why did she not act by having the Appellant examined?

39. In his defence the Appellant testified that there was something about containers between Pw2 and Dw2 and being Dw2's worker he bore the brunt. That he had even been threatened by Pw2. Dw2 confirmed having been given the report by the Appellant. When this defence which was sworn is weighed against the evidence of Pw1 and Pw4 it is clear that there is more to the alleged examination done by Pw4.

40. He took it upon himself to do the treatment note, PRC and the P3 form. How? Was he the only one on duty that day? I would not be surprised if the lab tests were also done by him. Though shown as EXB4, I have not seen the lab request form in the lower court record.

41. My finding is that the charge of defilement was not proved.

42. The Appellant faced a charge of indecent act with a child. The particulars are well stated in the charge as reproduced in paragraph of **1** of this judgment. Pw1 did not at any point state that the Appellant contacted his penis with her vagina. He did remove her clothes according to Pw1 and Pw2. An indecent act is defined under section 2 of the Sexual Offences Act as follows:

> **"indecent act" means**
>
> **a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include and an act that causes penetration.**
>
> **b. Exposure or display of any phonographic material to any person against his or her will;**

43. The acts of the Appellant do not fall under that definition. The prosecution having failed to prove its case on the alternative count which was never read to the Appellant, I find that the entire case left a lot to be desired and was not proved against the Appellant who will benefit from the doubt created in my mind over the same.

44. The upshot is that the appeal is meritorious and it is allowed. The conviction is quashed and sentence set aside. The appellant to be released forthwith unless lawfully held under a separate warrant.

Delivered, signed & dated this 8th day of May 2020, at Makueni.

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H. I. Ong'udi

Judge