**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CORAM: D. S. MAJANJA J.**

**CRIMINAL APPEAL NO. 88 OF 2017**

**BETWEEN**

**RICHARD AIGA CHOGO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence by Hon. D. Ogal, RM***

***dated 31st July 2017 at Hamisi Magistrates Court in Criminal Case No. 585 of 2014)***

**JUDGMENT**

1. The appellant, **RICHARD AIGA CHOGO**, was charged, convicted and sentenced to life imprisonment in the offence of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ('the ***Act***'). It was alleged that on 8th June 2014 at Wodanga Location of Vihiga County, he intentionally and unlawfully caused his penis to penetrate the vagina of MMA, a child aged 8 years.

2. As this is a first appeal, I am expected to examine all the evidence afresh and come to an independent conclusion as to whether or not to uphold the conviction and sentence bearing in mind that I neither saw nor heard the witnesses testify.

3. The prosecution called 6 witnesses at the trial. After being sworn, the complainant, PW 1, testified through an intermediary. She stated that she was in Class 3 and on the material day, 8th June 2014, she was with her friend, PW 4, when the appellant called them and told them to go to his house. When they arrived, the appellant asked PW 4 to climb a tree while he ordered PW 1 to go to the kitchen. PW 1 narrated what happened as follows:

> *The accused did bad things to me. He removed my clothes…… He then lay on me and asked that we do bad manners. He removed his dudu and inserted the same in mine. [PW 4] saw the accused insert his thing in mine. "The witness points her privates in reference to dudu" The accused woke up when he saw [PW 4]. He asked me to wear clothes.*

4. PW 4, was in the company of PW 1 on that day, also gave sworn testimony. She told the court that the appellant asked her and PW 1 to accompany him to his house. She also narrated what happened as follows:

> *Aiga told me to climb a guava tree …..… I climbed the guava tree… I then got out the house to look for [PW 1] and that is when I saw her lying on the ground with Aiga on top of her. PW 2 was naked. The accused dropped his pants on his knees. They were doing bad manners, I called PW 1 and Aiga got off her. …..*

5. The complainant's mother, PW 2 testified that she had earlier left PW 1 and PW 4 at home and when she came back in the evening, PW 4 told her what had taken place. When she asked PW 1 what happened, PW 1 narrated her order. Before taking PW 1 to the hospital, she checked her private parts and found the same was swollen and reddish and had a discharge. PW 1 complained that she was in pain. PW 2 took PW 1 to the health centre for examination and treatment. She testified that PW 1 was 10 years old.

6. The Investigation Officer, PW 5, testified that PW 2 reported the incident at Mudete Police Station on 9th June 2014. She issued a P3 medical form. The appellant, who had been arrested by members of the public, was brought to the Police Station by the assistant chief, PW 3. The Clinical Officer, PW 6, examined PW 1 on 9th June 2014. He noted that she had pains on the front part of the neck, her hymen was freshly broken. She was able to detect sperm and epithelial cells in her urine. He concluded that she had been defiled.

7. In his unsworn testimony, the appellant denied the offence. He stated that he was arrested on 9th June 2014 by officers as a result of family squabbles.

8. I have considered the evidence and I find that the testimony of P.W.1 and P.W.4 confirms that an act of penetration did indeed take place. Their evidence was consistent and duly corroborated by medical evidence that showed that there was indeed penetration.

9. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

10. The case against the appellant was dependent on the testimony of two children. PW 1 was aged 10 years while PW 4 stated that she was in Class 4 hence likely to be about 10 years old. They were therefore children of "*tender years"*. In the case of ***Kibageny arap Kolil v R* [1959] EA 92** which has been followed in subsequent cases by the Court of Appeal, is was held that the phrase, *'a child of tender years'* means a child under the age of 14 years (see ***Samson Oginga Ayieyo v R* CA KSM Criminal Appeal No. 165 of 2006 [2006]eKLR**).

11. The law governing reception of the evidence of a child of tender years is to be found at **section 19** of the ***Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)*** which provides:

> *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.*

12. The procedural prerequisite before reception of evidence of child of tender years under **section 19** of the ***Act*** has been considered by the Court of Appeal in several cased among them ***Johnson Muiruri v Republic* [1983] KLR 445** and ***Kinyua v Republic* [2002] 1 KLR 256**. The authorities show that if, after the *voire dire* examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, the child possessed of sufficient intelligence and understands the duty of speaking the truth.

13. The consequence of whether testimony is sworn or unsworn is important. Ordinarily sworn evidence does not need corroboration. **Section 19** of the ***Oaths and Statutory Declaration Act*** had a proviso which stated:

> *Provided that, where evidence admitted by virtue of this Section is given on behalf of the prosecution in any proceedings against any person for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.*

That section was amended and that proviso re-enacted as **section 124** of that ***Evidence Act (Chapter 80 of the Laws of Kenya)*** and a further proviso added thereto as follows:

> *Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.*

14. The next line of inquiry is what is the effect of failure to follow the procedural dictates I have set out above. The authorities hold that failure to follow the prescribed procedure does not necessarily vitiate the trial. In ***Patrick Kathurima v Republic* CA NYR CR App. No. 131 of 2014 [2015]eKLR**, the Court of Appeal observed that;

> *The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt.*

15. In ***Maripett Loonkomok v R* CA MSA Criminal Appeal No. 68 of 2015 [2016]eKLR**, the Court of Appeal stated;

> *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." See Athumani Ali Mwinyi v R Cr.Appeal No.11 of 2015*

16. Following the statements of principle, I have outlined above, the issue I find that the proper approach is to the testimony of PW 1 and PW 4 is to consider it as unsworn testimony, evaluate it with the rest of the evidence to see whether a conviction can be sustained.

17. The testimony of PW 1 and PW 4 is consistent and it is that the appellant did act sexually assault PW 1. PW 4 saw him take PW 1 to his house and saw him committing the felonious act. It is trite that the testimony of PW 4 is incapable of corroborating that of PW 1 however,

there is further evidence giving credence to the testimony of PW 1 and PW 4. Both of them told PW 2 what had taken place at the earliest opportunity. Further PW 2 saw PW 1 in state of distress before taking her to hospital for treatment. The fact of penetration was confirmed by the medical evidence presented by PW 6 thus corroborating the testimony of PW 1 and PW 4 was properly. The appellant's defence was a bare denial and in light of the totality of the evidence, it is dismissed.

18. The sentence of life imprisonment was within the mandatory minimum under **section 8(2)** of the ***Act***. I however note that the Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; ***BW v Republic*** **KSM CA Criminal Appeal No. 313 of 2010 [2019]eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014.** In line with these decisions and considering the gravity of the offence, I sentence the appellant to 30 years' imprisonment.

19. For the reasons I have set out, I uphold the conviction and quash the sentence of life imprisonment and substitute it with a sentence of **thirty (30) years** imprisonment from the date of conviction.

**DATED** and **DELIVERED** at **KAKAMEGA** this 2nd day of September 2019.

**D. S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.