REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 44 OF 2018

LUKE ODUOR OKWANY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of Ukwala Principal Magistrate's Court Criminal Case 273 of 2017 dated 30.8.2018 before Hon. C.I. Agutu – Resident Magistrate)

JUDGMENT

1. The appellant **Luke Oduor Okwany** was charged, tried, convicted and sentenced to a fine of KShs.200,000/= in default to serve a prison term of three years for the offence of **grievous harm contrary to Section 234 of the Penal Code**. This was on 30.8.2018, in Ukwala Senior Resident Magistrate's Court Criminal Case No. 273 of 2017. Particulars were that the appellant, Luke Oduor Okwany on the 4th day of June, 2017 at around 7.30 p.m. at Ukahama village, Ugunja Sub-Location within Ugunja Sub-County of Siaya County he unlawfully did grievous harm to Rosemary Atieno Ranginya.

2. The appellant pleaded not guilty to the charge dated 22.8.2017 and the prosecution called 7 witnesses to prove their case. The appellant was placed on his defence. He gave sworn testimony and called three witnesses to testify in his favour.

3. Dissatisfied with the judgment, conviction and sentence passed by Hon. C.I. Agutu, Resident Magistrate on 30.8.2018, the appellant filed this appeal and Appeal No. 43/2018 but the latter appeal was withdrawn in favour of this appeal on 4.6.2019 as per the letter of withdrawal of Criminal Appeal No. 43/2018 dated 30.11.2018. In the Petition of Appeal dated 11.9.2018 filed by Ms. Ken Omollo and Company Advocates on behalf of the Appellant, the appellant raises 10 grounds of appeal challenging his conviction namely:

> ***1. The learned Trial Magistrate erred in law and in fact by failing to appreciate that the evidence on record was not watertight enough to warrant a conviction.***
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> *2.* ***The Learned Trial Magistrate erred in law and in fact by convicting the appellant without*** **sufficient** ***evidence on record****.*
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> ***3. The Learned Trial Magistrate erred in law and in fact by relying on evidence which was not corroborated and lacked probative value and therefore unsafe for a conviction.***
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> ***4. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the defence evidence adduced by the Appellant.***
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> ***5. The Learned Trial Magistrate erred in law and in fact by shifting the burden of proof to the Appellant.***
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> ***6. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the appellant was a first offender.***
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> ***7. That the sentence was excessive in the circumstances.***
>
> ***8. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that in the case of indecent act, the complainant must demonstrate the accused's act.***
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> *9.* ***The Learned Trial Magistrate erred in law and in fact by failing to give the accused opportunity to mitigate before sentencing****.*
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> *10.* ***The Learned Trial Magistrate erred in law by relying on the evidence partly recorded by another Magistrate in convicting the appellant without adhering to the provision of Section 200 of the Criminal Procedure Code thereby causing prejudice to the appellant****.*

4. The appellant urged the court to quash his conviction and set aside the sentence imposed on him and set him free.

5. This being a first appeal, I must as required by Law re-evaluated the entire evidence adduced before the trial Court, reassess it and arrive at my own independent conclusion bearing in mind that I neither heard nor saw the witnesses as they testified. See **Okeno v Republic 1972] E.A. 32.**

6. Revisiting the evidence for the prosecution and the defence, the prosecution's case was that PW1, the complainant, Rosemary Atieno Rangiyo who testified as PW1, on 4.6.2017 at 7 p.m. she was in her main house with her grandson DO a minor, listening to the radio when she heard someone calling her out. She instructed her grandson to reduce the volume of the radio and she was able to hear clearly someone calling her from out asking her "***sien***" why are you quiet, yet I am calling you?" The person whom she later identified as Akinyi told PW1 to move near. Akinyi was outside and that there was moonlight. Behind her, was her (***Akinyi's husband***) who was following Akinyi. He was dressed in black and carrying a hoe.

7. According to PW1, Akinyi's husband questioned why Akinyi was still around yet he was chasing her. Akinyi's husband then aimed the hoe at the complainant's head. She protected her head with the left hand and the hoe hit her left hand which broke. At the time of hearing, she was in a sling and bandage in her left arm. That she fell down and asked the assailant whom she called father to Marvin why he was beating her. That the assailant told her that he was ***sirkal*** (government) and that there was nothing wrong with him beating up the complainant.

8. At that time, according to PW1, her grandson O raised the complainant up and she directed him to call her daughter Eunice Achieng. She also instructed her grandson to close the door and escort her to her maiden home which was not far, so that she could be assisted to get medication.

9. On reaching her maiden home, she was assisted to Sigomere Hospital where they found her daughter Eunice Achieng had arrived. She was given tetanus injection, and admitted for observation then she was referred to St. Mary's Mumias where her hand was plastered.

10. She later recorded her statement with the Police station at Sigomere. Later, she was operated on and metal implants put in her fractured hand. That she was admitted for 8 days. She stated that at the trial time, she was still on medication. PW1 identified the appellant as her assailant. She stated that he was her nephew. She identified her medical treatment book and P3 form.

11. On being cross-examined by Mr. Sakwa Counsel for the appellant, PW1 reiterated her evidence in Chief and stated that she had already eaten her dinner but her grandson D was still eating. She stated in addition that there was a public road outside her house and that Akinyi was calling her "***Sien***" which was PW1's clan name.

12. She stated that the appellant was her immediate neighbour and was close to her. She stated that Akinyi had said that the appellant who was her husband had told her to return to him after their divorce. PW1 also stated that the appellant wanted to beat his wife – Akinyi but that she escaped and he told PW1 that the latter was inciting his wife and that he beat PW1 using a jembe (hoe). She stated that D, her grandson was outside the door. She denied having any dispute with the appellant.

13. She stated that neighbours did not respond to her screams as some are dead or far off. She stated that when she went to hospital, the staff refused to treat her and only gave her tetanus injection and referred her to the police to report the incident and be issued with a P3 form before they could treat her. (***The trial court observed that the complainant's hand had a big scar forming keloids after operation***) as per the medical notes.

14. PW1 denied seeing iron sheets. She maintained that the appellant gave her one strong blow which broke her hand. She stated that Akinyi was outside her house and that she gave D her phone. She denied there being any land issue.

15. PW2 D O aged 12 years in Class Seven gave evidence on oath after the trial magistrate asked a few questions in ***voire dire*** examination and stated that on 9.6.2017 at around 9 pm, a Sunday he was preparing to eat supper. That he heard his grandmother PW1 being called from outside and that she instructed him to reduce the radio volume as she proceeded outside the house. PW2 remained inside the house but that he heard the voice of a woman calling out on his grandmother. That he heard Baba Coli saying, "***Akinyi, you have not left***", so PW2 got outside and saw Baba Coli whom he identified as the accused sited in court, assault PW2's grandmother, PW1 two times using a stick and that PW1 asked why the accused was beating her and he retorted that, "***I am Sirkal***", ***do what you want***". PW2 stated that the accused placed the stick on his shoulder which was a hand of a hoe and that there was moonlight. That PW1 called out PW2 to raise her up and to bring her phone and a turban (***leso***) and padlock for the door and call Eunice Achieng. They then proceeded to Sundusia, PW1's home and on arrival, they found PW1's brother Protus who called Ramadan who came and PW1 was assisted on a motor cycle and taken to hospital while PW2 remained at Sundusia. He stated that the accused aimed at the head of PW1 but she blocked with her hand. PW2 later recorded his statement before elapse of a week.

16. On being cross-examined by the Appellant's counsel, PW2 stated that the accused was alone. He also stated that he had known Akinyi for 5 years and that she had called his grandmother, "***sien***", "***sien***". He stated that his grandmother went outside and he also went outside when he heard the voice of the accused person but did not reach where the accused was or where Akinyi was. He stated that he heard the accused person asking, "***Akinyi, you not left***?" He stated that Akinyi was talking to PW1. He also reiterated his evidence in chief and stated that the accused had a black pair of trousers and a black jacket and that he stood as the accused beat PW1 and that when PW1 called him nearer, he asked what it was. He stated that the accused was their neighbour, and that the other neighbour was deceased while Margaret Nginywa was away. He maintained that the accused had a hoe handle on his shoulder. He denied seeing iron sheets on the spot. He stated that after PW1 fell, she asked the accused why he was beating her and that PW1 screamed but did not call anyone. He said that he called his aunt and told her the accused had beaten PW1. He said PW1's hand was swollen and that she only does light duties. He stated that Akinyi was a wife to the accused. He denied the existence of an earlier dispute. He denied being forced to lie to the court. He maintained that he was saying what he saw and that what he said to the police is what he had told the court. He said that he had approximated the time of the incident. In re-examination, he stated that he came out with a solar lamp but that there was moonlight.

17. PW3 Eunice Achieng Omondi testified and recalled that on 4.6.2017at about 8 pm he was called by her nephew who told her that Obare had beaten his grandmother. She went to her home but found when PW1 had already left so she followed them and met them with Protus and Stephen and called a motor bicycle and they took her to hospital while she remained behind. She stated that PW1 was admitted for 2 days and that Obare went the next morning to take PW1 to hospital and that he returned the following day but they told him that they did know in which hospital PW1 was. She did not see PW1 being beaten.

18. In cross examination, she stated that it was her nephew, "***junior***" who called her saying PW1 was beaten and that he used PW1's phone and that PW1 also spoke to PW3 on phone.

19. PW4 Stephen Opondo recalled that on 4.6.2017 he received a telephone call from Protus who told him to go and on arrival he found PW1 and PW2 D *alias* Junior. That PW1 told him that Obare had '***killed***' her. Together, proceeded to the home of PW1 but enroute they met PW3 and they escorted PW1 to hospital where they were referred to Sigomere Police Station and reported the matter before proceeding to hospital where PW1 was hospitalised but because there was a doctor's strike they went to St Mary's Hospital Mumias. Xrays and plastering was done and later P3 form was filled at Sigomere.

20. In cross examination, PW4 maintained that he was called by Protus Opondo at 8.30 pm and that PW1 said that Obare had broken her hand.

21. PW5 Protus Ouma Opondo testified and recalled that 4.6.2017 at 8.00 pm he was in his house when PW1 his sister went there crying saying they had killed her. She was with PW2 and said she had been beaten and that PW2 said Obare had beaten PW1. PW1's hand was tied in suspension. PW5 called a motorcyclist who declined. They went to Sigomere Hospital using a motorcycle called by PW3 but were advised to go to the police station first to get an OB number. There was an ongoing Doctor's strike at Siaya Hospital so PW5 took PW1 to St. Mary's Hospital, Mumias.

22. Martin Onyango Onyango testified as PW6 and recalled that he was a clinical officer at Amase Dispensary. He recalled that on 4/6/2017 he was a volunteer Clinician at Sigomere and was allowed to view patients. He stated that PW1 was seen at Sigomere by unknown clinician but that the clinical notes Exhibit 1A was not signed which was an oversight.

23. He stated that the patient had pain on the upper left hand which was tender supported by a sling, complained of having been injured with a hoe handle by a person well known to her. The patient was referred to a higher hospital after she was given painkillers. The P3 form was later filled. She was an elderly lady with plaster paris supported by a sling. The degree of injury was assessed as grievous harm. The Xrays showed she had a double facture of ulna and radius. He produced discharge summary from St. Mary's Hospital, outpatient summary from Sigomere Hospital and Xrays readings from St. Mary's Hospital.

24. In cross examination by the appellant's counsel, PW6 stated that age is a factor in healing process and that plaster paris may be removed in 2-3 months. That in filling the P3 form he used treatment notes from both hospitals albeit the author (from Sigomere Hospital) did not sign the documents. He stated that he filled the P3 form and signed it. He stated that he had worked for the Government for 2 years. He stated that there are designated officers but he was delegated to work by Victor Godia who had left the hospital shortly.

25. He stated that grievous harm deforms and that when he saw the complainant her hand unable to function. He stated that he worked with Aphia Plus in conjunction with the Ministry of Health. He said that he was licensed.

26. In re-examination, he stated that 'practitioner' means any licensed medic and that the hospital licensed him. He stated that his phone number was written on the P3 form for him to come to court. He also stated that all the findings in the documents were consistent.

27. PW7 No 105593 PC Carol Kosgei attached to Ugunja Police Station was introduced to the complainant and the appellant who was the Area Chief of Ukalame location by the OCS. Her, together with PC Galole and DCIO IP Nyambati interrogated the two people and PW 1 narrated to her what happened to her on 4/6/2017 while she was at her house and how the appellant who was chasing his former wife Patricia Akinyi who had 4 iron sheets and when PW1 went to inquire as to what was happening, the appellant used a hoe handle and tried to hit Patricia but PW1 intervened giving her a chance to escape and he hit PW1 when she raised her hand and the appellant boasted - that PW1 could not find assistance anywhere as the appellant was a law enforcer.

28. That when the appellant was interrogated, he alleged that PW1 had fallen on trees. PW7 visited the scene but found no trees. After recording statements from witnesses and a P3 form being filled, they charged the appellant with the offence of grievous harm. In cross examination, PW7 stated that the accused took iron sheets to AP camp.

29. At the close of the Prosecution's case, the appellant was placed on his defence. He gave sworn testimony and stated that he was Luke Oduor Okwany, Assistant Chief of Tingare East, North Uholo. He stated that he knew the complainant. He recalled that on 4/6/2017, a Sunday, at 6.30 pm he visited his elder brother Ramlus Otieno Okwany and that as they were conversing, he got information from one Joseph Manyasa who told him that as he passed at the appellant's house, he saw the appellant's former wife Patricia Akinyi Oduor seated on iron sheets on the appellant's farm.

30. That the appellant went to enquire and found Patricia alone at the scene with no iron sheets. He greeted her and after asking her on her intention as he had not invited her, she told him that she had come to stay. That the appellant advised her to take legal procedures since she had remarried at Emasinjira and her husband had paid dowry.

31. That he asked his former wife to leave but she stayed put and so he took away the iron sheets and she promised to leave. That at around 7.00 pm, the appellant who had returned to his brother's house heard from Carolyne Adhiambo Owuor that Patricia was helped by PW1 and that he saw Patricia and Rosemary conversing. He went and spoke to Patricia after Rosemary moved back. He questioned Patricia why she had brought iron sheets back to the scene, and tried to take them away but she resisted. That Patricia lost grip and fell on the complainant, so

he moved away with iron sheets and the complainant woke up and went to her home without any complainant but he heard her say she had injured her arm and called PW2 who was about 25 metres from the scene.

32. The appellant denied assaulting the complainant and stated that there were no eye witnesses and that he took the iron sheets to Tingare Police Station and registered vide OB No. 4/9/6/2017 at 12.30 hours and the police told him to return the following day. That the police visited the scene but could not trace Patricia. He denied being armed or injuring the complainant and stated that he visited the complainant twice to say sorry and that he was very remorseful. He produced as exhibit copy of proceedings and judgment in a divorce cause with Patricia, his ex-wife.

33. In cross examination, the appellant stated that he gave the police the right information. He stated that he had a scuffle with Patricia and pushed her. He blamed DCIO for not capturing all the information. He maintained that it was Patricia who made PW1 fall nearer the fence.

34. In re-examination he stated that he had no argument with PW1 but that PW1 was advising that he should admit his former wife.

35. The appellant also called DW2 No. 66883 CPL Luwambi from Sigomere Police Station who testified that he had known the appellant for 2 years and that on 4/6/2017 at 8.00pm, the appellant went to the police station and reported that 'Beatrice' Akinyi and PW1 had trespassed at his home. He was carrying 4 iron sheets. He was told to go and return the following day and the following day DW2 visited the scene. He did not find the accused's former wife and that he did not inquire whether there was a confrontation between the accused and the complainant.

36. In cross examination, DW2 stated that he did not find the appellant's wife and that there was no sign of preparations to build a house. That he found the scene disturbed, a sign of struggle and that the appellant told him that Patricia fell on PW1. He denied knowing anybody was injured. He later learnt of an assault.

37. DW3, Ian Romlus Otieno Okwany testified and stated that the appellant was his younger brother. He recalled that on 4/6/2017 he was at his home when the appellant went visiting and as they talked, Joseph Manyasa went and informed them that the appellant's former wife Clarice Akinyi had an intention of building a house. The appellant went and told her of the divorce but she refused to leave. Later Carolyne Anyango also called the appellant, he went and returned telling DW3 that his former wife had come with Rosemary and that he had taken iron sheets. He stated that PW1 was their paternal niece and were close neighbours and had lived harmoniously so he was shocked when the appellant was arrested.

38. In cross examination, he stated that he did not witness any shouting, conversation between Luke and Patricia or a scuffle, push or shoving.

39. DW4, Carolyne Anyango Oduor the wife of the appellant testified that the complainant was a clan mother inlaw and that on 4/6/2017 at 7 pm she was from the posho mill when she met the appellant behind her house and he told her that Joseph had told him that Patricia had come with iron sheets and that he carried the iron sheets away. He then went to Ramlus and at 8pm she saw 2 people one carrying iron sheets and another behind 20 metres away. There was moonlight so she went to Ramlus. She saw Patricia carrying iron sheets and Rosemary.

40. She heard the Appellant say that he had carried away the iron sheets but Patricia did not respond. She stated that the Appellant and Patricia fought over the iron sheets and that Rosemary and Patricia fell but nobody screamed. She denied that the appellant had a stick or did she see Rosemary being beaten but she heard Rosemary call her grandson Junior three times asking him to bring a phone for her to call her children as it seemed as if she had been hurt.

41. In cross examination, she stated that she did not follow the appellant and that there was hedge between where she was and where the appellant was but that she could hear and see. Rosemary pleading that Patricia be left to stay. She stated that they were only speaking, not quarrelling.

SUBMISSIONS

42. In support of this appeal, the appellant's counsel filed written submissions which were orally highlighted. The Respondent's counsel made oral highlights.

43. According to Mr. Rakewa Advocate, there was no voire dire examination carried out on PW2 yet the trial court heavily relied on his testimony to convict the appellant. He relied on the decision in ***Arthur Muya Muriuki v. R [2015]*** which laid down the essentials of voire *dire* examination and the case of ***Peter Kariga Kivue Cr. A 77/1982 V(R)*** citing **Section 124 of the Evidence Act** and submitted that there was no basis for forming the opinion that the minor had the ability to give sworn testimony. He also relied on ***Kiveveko Mboloi V R [2013]eKLR cited in R Vs. Lal Khan [1981] 73 Cr. App. 190*** where it was held inter alia that in voire dire examinations, questions put to the minor must appear on the shorthand note so that the course the procedure taken in the court below could be seen.

44. It was further submitted that the minor's evidence was not corroborated by other material evidence as required under **Section 19 of the Oaths and Statutory Declarations Act as read with Section 124 of the Evidence Act** hence that evidence of PW2 was inadmissible in court. Reliance was placed on ***Arthur Muya Muriuki V R and Nyasani S/O Bichana V R*** where the court held that failure to conduct voire dire examinations on a child was sufficient to render the trial fatal.

45. It was further submitted that the trial court disregarded the evidence of the appellant and shifted the burden of proof to the appellant from the prosecution as required by law. That the trial court poked holes in the appellant's defence without giving reasons and that the conviction of the appellant was premised on the weaknesses in his defence as opposed to the proof by the prosecution. Reliance was placed on ***Michael Mumo Nzioka V R CRA 96/2017[2019]eKLR***.

46. It was further submitted that there was glaring inconsistences in the medical evidence adduced by PW6 and that he was not qualified to give such testimony as he was first a volunteer not employed by the Government of Kenya. That PW6 filled P3 form using clinical notes which were not signed by the author hence the P3 form was inadmissible. Counsel urged the court to find as was in ***Mulwa Kivaya Nthenge V R [2012]eKLR*** that a clinical officer was not a medical officer capable of giving medical evidence as envisaged by law. He argued that PW6 a health volunteer could not give evidence as he was a licensed clinical officer under **Clinical Officer (Training, Registration and Licencing) Act Cap 260**.

47. On inconsistencies, it was submitted that PW1 did not refer to Xray films to report yet the court relied on Xray report produced as Ex1(d)&(e). That PW3 stated that PW1 was admitted for 2 days yet PW1 stated that she was admitted for 8 days; That PW7 spoke of iron sheets surrendered to the police but no iron sheets were produced in court and that only PW1 and PW2 at the scene and Akinyi the cause of all the issues in the case was not called as a witness.

48. The appellant's counsel further submitted that the trial court relied on evidence not identified or referred to by the complainant in her testimony contrary to **Section 42A of the Criminal Procedure Code and Article 50(2)(j) of the Constitution of Kenya** (but the specific evidence was not outlined by counsel). It was further submitted that the names of Xray film and P3 form did not match. Reliance was placed on ***Erick Onyango Ondeng V R [2014]eKLR*** on the duty of the trial court to carefully analyse the contradictory evidence if any and determine which version it prefers on the basis of judicial reason.

49. It was also submitted that the trial court relied on evidence provoked by the prosecution witnesses even when such evidence was not tabled. i.e PW7 the Investigating Officer mentioned about iron sheets which were not produced as exhibits and that neither was Akinyi the key witness who was at the scene during the alleged assault called to testify which raises questions on the veracity of the evidence given. Reliance was placed on ***Benard Odongo Okuku V R CRA 10/2017 [2018]eKLR citing Bukenya V Uganda***. Counsel urged the court to acquit his client of the charge and quash the sentence imposed. The oral highlights reiterated the written submissions.

50. The Prosecution led by the Mr. Okachi, Senior Principal Prosecution Counsel opposed the appeal and submitted that there was sufficient evidence on record and that voire dire examination was done. Further, that a 'proper' voire dire is comparative. In this case, it was submitted that the court was satisfied that the minor aged 12 years was a competent witness to give sworn testimony.

51. On the evidence of PW6, a clinical officer volunteer, it was submitted that he produced the P3 form on behalf of the clinical officer and that no issue was raised hence his evidence was admissible.

52. On inconsistence, it was submitted that the number of days the victim was in hospital was not core to the charge and did not go to the root of the case. Further, that what was material was the magnitude of the injuries sustained by the victim.

53. On production of iron sheets, it was submitted that they were not useful or relevant to the prosecution's case.

54. On failure to call a key witness, it was submitted that the prosecution called evidence which was relevant to its case.

55. On corroboration of PW2's evidence, it was submitted that PW2's evidence was corroborated by PW6. Further, that there was no shifting of the burden of proof.

56. Counsel submitted that the prosecution proved its case beyond reasonable doubt and urged this court to dismiss this appeal.

57. In a rejoinder, Mr. Rakewa submitted that the trial court record does not show the flow of question and answer sequence of voire. Further that PW6 produced documents of someone he did not know.

58. On inconsistences, it was submitted that Xray film was core to the case to prove a fracture. Further, that it was iron sheets that caused a dispute hence they were crucial. In addition, it was submitted that Akinyi was crucial because she came with iron sheets yet no explanation was given why she was not called. Counsel urged the court to allow the appeal.

DETERMINATION

59. I have considered the appeal herein, the evidence adduced for the prosecution and the defence before the trial and the written and oral submissions for and against the appeal together with statutory and judicial decisions relied on by the appellant's counsel as well as the constitutional provisions.

60. In my humble view, the following issues flow for determination in this appeal:

> **(1)** ***Whether voire dire examination was conducted on PW2 who was a minor and the effect of failure to conduct a proper voire dire examination on the child aged 12 years in such proceedings.***

61. The appellant's counsel submitted that failure to conduct a proper voire dire examination on PW2 was a fatal omission and he cited several decisions in support of the proposition. Counsel also relied on **Sections 19 of the Oaths and Statutory Declaration Act as read with Section 124 of the Evidence Act**.

62. 'Voire dire' is a French term which etymologically implies to speak the truth. Voire dire examination is a preliminary examination of a witness on his/her competence, and or capacity to tell the truth. It is trite law that evidence of children under the age of 18 years may be received, not on oath, or affirmation, which should be clearly recorded in proceedings for the court to satisfy itself that such child possesses sufficient intelligence to justify the reception of such evidence and that such child understands the duty to speak the truth. This is because

evidence on oath does not need corroboration unlike other evidence.

63. In ***Robi Vs R[1971] HCD No. 389,*** **Elkindy J** stated:

> ***"It is necessary that the trial court must examine the child witness before admitting his evidence to determine the capacity of such witness to give evidence."***

64. In ***Alfred Tedo Vs. R [2001] TLR 126***, the High Court of Tanzania stated:

> ***"……Under Section 127 (3) of the Evidence Act, 1967, a court may convict an accused person on uncorroborated evidence and after fully being satisfied that the child or children are telling nothing but the truth."***

65. In ***Gabriel Maholi Vs. R [1960] EA 159***, the former Court of Appeal for Eastern Africa stated:

> ***"….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 truth and falsehood."***

66. In ***Johnson Muiruri Vs. R [1983] KLR 445***, the court stated: -

> ***"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 the oath in which even his sworn 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 in support thereof implicating him.***
>
> ***It is important to set out the question 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.***
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> ***When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the must be recorded, so that the cause the court took is clearly understood.***
>
> ***A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and responsibility to tell the truth involved in, the oath apart from the ordinary social duty to tell the truth.***
>
> ***The Judge is under the duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so, is fatal to conviction."***

67. The Appellant in this case contends that the trial court heavily relied on the evidence of PW2 a minor aged 12 years to convict the appellant because apart from the complainant, no other witness was present who witnesses the incident wherein PW1 claimed that she was assaulted by the appellant.

68. He further complains that **Section 19 of the Oaths and Statutory Declarations Act** mandates that: -

> ***"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 on oath, if in the opinion of the court or such a person, he 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 in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."***

69. In ***Julius Kiunga M'rithia Vs. R[2011]eKLR***, the court held:

> ***"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap 15 Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about.***
>
> ***(1) Whether the child understands the nature of an oath; or***
>
> ***(2) 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."***

70. The procedure of conducting a voire dire examination was stated in ***Franscisco Matove V R [1961]EA*** that:

> ***(1) The trial court should question the child to ascertain whether the child understands the nature of the oath.***

(2) If the court does not allow the child to be sworn, it should record whether or not, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.

71. The Court of Appeal has severally held that the age of 14 years remains a reasonable indicative age of competency to testify for purposes of **Section 19 of the Oaths and Statutory Declarations Act.** ***(See Maripet Loonkomok V R [2016]eKLR; Patrick Kathurima V R CRA 137/2014; and Samuel Wami Karimi V R [2016] eKLR.***

72. In the instant case, PW2 was recorded as a male minor and the trial court stated:

PW2 Male minor, Ian D O O. I am 12 years old. I go to [particulars withheld] Primary School. I am in Class Seven. We are in Ukwala Law Courts. I go to Catholic Church.

Court: Minor sworn

…….

73. And the evidence of PW2 was taken and he was cross examined. It is not even indicated in which language the minor was sworn or the language that the evidence was given by the minor.

74. While still on the question of the swearing witnesses, the evidence of DW1 the appellant was taken on 30/7/2018 after a ruling on 3/7/2018 that he had a case to answer and Mr. Oduor Counsel for the appellant stated that his client would give sworn evidence and call 3 witnesses. On 30/7/2018 when DW1 gave evidence, although he was cross examined, there is absolutely no indication that he was sworn or affirmed.

75. In the same vein, DW2 who was recorded as a male Christian, was never sworn albeit he was cross examined. Being sworn to testify or being affirmed cannot be presumed by the court. It must be recorded in writing. Only DW3 and DW4 were sworn.

76. This court is concerned on the manner in which such evidence was taken by the trial court, besides failure to take a voire dire examination on PW2 a minor aged 12 years to determine whether he possessed sufficient intelligence to give evidence on oath and or whether he understood the nature of an oath and telling the truth.

77. The effect of non-compliance with **Section 19 of the Oaths and Statutory Declarations Act** was considered by the Court of Appeal in ***Samuel Warui Karimi V R (supra)***:

"……..we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right to a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial because problematic. In the circumstances, we find the evidence by the complainant was not properly received thus, the conviction of the appellant because unsafe to sustain as she was the complainant and not any other witness."

78. In the instant case, PW2 was not the complainant but an eye witness who allegedly saw the appellant assault PW1. However in ***Maripet Loonkomok V R (supra)***, a different Court of Appeal Bench stated as follows concerning the effect of non-compliance with **Section 19 of the Oaths and Statutory Declarations Act:**

"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 cases 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 Athuman, Ali Mwinyi V R Cr. Appeal No. 11 of 2015.***

On peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voire dire examination. The complainant's evidence was congent, she was cross examined and medical evidence confirmed penetration. But of utmost significance is the admitted facts 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."

79. Therefore, from the above decisions, whereas evidence of a child of tender years which is not subjected to voire dire examination cannot be wholly relied upon to convict an accused person, the other evidence adduced in a criminal trial om appropriate cases can still be relied on to determine the guilt or otherwise of an accused person.

80. In the instant case, PW2 was not the complainant. He was testifying to support the evidence of PW1 as he was present when PW1 was allegedly assaulted. However, as there was no voire dire examination on PW2 I find that his evidence was not dependable and therefore that leaves us with the testimony of PW1 and the question is whether excluding the evidence of PW2, it would still be safe to rely on the testimony of PW1 and PW6 a volunteer clinician to make a finding that PP1 was assaulted by the appellant.

81. However, as I have stated, there is no evidence on record that the appellant's evidence was taken on oath or that he was affirmed yet after the court found that he had a case to answer, his advocate Mr. Oduor submitted that his client would give evidence on oath, and he was even cross examined. Similarly, DW2 was not sworn or affirmed although he was cross examined. Failure by the trial court to swear or affirm witnesses is grave. **Section 151 of the Criminal Procedure Code** provides:-

> ***"Every witness in a criminal cause shall be examined upon oath and the court before which any witness shall appear shall have full power and authority to administer the usual oaths."***

82. Under **Section 15 of the Oaths and Statutory Declarations Act, Caps 15 Laws of Kenya**, the persons who object to the taking of an oath shall be affirmed. **Section 16** of the said Act sets out the form of affirmation to be administered.

83. **Archibold on Criminal Pleadings, Evidence and Practice 2002** states:-

> ***"The general common law rule is that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he had previously been sworn to speak the truth.***
>
> ***……This general common law rule is subject to important exceptions (post 55. 8-31 et seq). The witness must be sworn in open court."***

84. In Kenya, the only exception to that general common law rule is **Section 19 of the Oaths and Statutory Declarations Act** with regard to evidence of children of tender years who do not understand the nature of an oath, as stipulated in said section.

85. In ***John Kairuki Gikonyo V R [2019]eKLR***, the Court of Appeal per Alnashir Visram, W. Karanja & Koome, JJA held as follows where evidence of PW2 was not taken on oath and the effect of such evidence in a criminal trial:

> ***"……As rightly submitted by counsel for the appellant, the consequences of testimony given without oath or affirmation are dire, as the defect in turn impacts on the legality of the conviction (Samuel Muriithi case supra). The learned first appellate Judge erred in failing to address this issue even though the same was raised before her. What is the way forward? As per Phipson on Evidence 13th Edition, page 159, where a witness has given testimony without oath or affirmation, the defects is curable by recalling the witnesses and administering the oath or affirmation or then asking him or her to ratify his previous testimony.***
>
> ***However, where the trial has already been concluded as is the case herein, the recourse left, is either an acquittal or a retrial, depending on the circumstances of the case."***

86. The Appellate court then pondered whether or not to order for a retrial, applying the principles laid down in ***Ahmedi Ali Dharamshi Sumar V R (1964) EA 481 and Fatenah Manji V R (1966) EA 343*** and held that failure to swear or affirm PW2 was a mistake by the trial court and that the prosecution had nothing to do with it. However, because the prosecution never addressed the court on availability of witnesses to testify should a retrial be ordered 6 years after the offence was committed, the court proceeded and allowed the appeal, quashed the appellant's conviction and set aside the sentence of death.

87. In the present case, the appellant had a right to choose to give his testimony on oath, or not as stipulated in **Section 211 of the Criminal Procedure Code**. However, having chosen to be sworn, it was the duty of the trial court to ensure the appellant and his witness were sworn and to record that the appellant was giving evidence on oath and if so, indicate the language used by the appellant in the proceedings on taking of oath. Nothing is on the original handwritten trial court record which I have perused to show that DW1 and DW2 were sworn before they testified and no language used was indicated on record.

88. The trial court hand no discretion under **Section 151 of the Criminal Procedure Code** to take evidence of a witness unless that witness was either sworn or affirmed. And as the trial as already been concluded, there is no opportunity to recall DW1 and DW2 to be sworn. The only option for this court would be to order for a retrial as the mistakes of failure to conduct voire dire examination on PW2 and to take evidence of DW1 and DW2 on oath was entirety on the part of the trial court, not the prosecution or the defence.

89. But before arriving at such a conclusion on whether to order for a retrial or not, I must also examine the complaint raised by the appellant that PW8 was not a competent witness and that being volunteer clinician who was not a government employee he had no authority or capacity to fill the P3 for the complainant. In addition, it was contended that he used treatment notes which had no signature of the author to fill the P3 form.

90. It must however be appreciated that the evidence on record shows that the doctors in public hospitals had gone on strike at the time that PW1 was allegedly injured and received at Sigomere Hospital before being referred to St. Mary's Mumias Hospital for further treatment. Where medical personnel are on strike, and a volunteer clinician is available as was in this case, I find no law barring a volunteer clinician or even a private medical practitioner from filling a P3 form; relying in the history of the patient and available treatment notes.

91. In this case, there was no objection taken by the appellant's counsel as to the capacity of PW6 to fill a P3 form then and therefore it cannot be the subject of the appeal. PW6 stated that he was a clinical officer at Amase Dispensary. He was previously a volunteer clinician at Sigomere. He was not questioned on his qualification as at 4/6/2017, and no doubts were cast to whether he was qualified as a clinical officer or not. He stated that he had worked for the government for 2 years. He was testifying about one year after the incident, after filling the P3 form for PW1. He stated that he was licenced and that he was delegated to work by Victor Godia. He also stated that he relied not only on the treatment notes which are problematic as they were not signed by the medical personnel who first attended to PW1 at Sigomere

on the night of 4/6/2017, but also relied on the discharge summary PEx1C from St. Mary Hospital.

92. In my humble view, even in the absence of Ex1A which is a patient's record book for Rosemary Atieno aged 52 years female and which is undated, the clinical officer PW6 had more than sufficient documentation in the form of discharge summary and the patient's own history and Xray reports and films produced in evidence to enable him to fill the P3 form and asses the degree of injury sustained by the complainant which he did on 7/6/2017 a few days (3 days) from the date of alleged injury on 4/6/2017.

93. Having said that, I would not delve into the other grounds of appeal which touch on the merits of the appeal. I am satisfied that at this stage, there was a mistrial in this matter as the trial record does not show that the appellant who wished to testify on oath was sworn and secondly, the record does not show that his witness DW2 was even sworn before he testified. I find the trial of the appellant to have been defective. In **Fatenah Manji V R (supra*)*** the Court of Appeal for Eastern Africa stated:

> ***"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."***

94. In my humble view, it would not be futile to order for a retrial of the appellant, which will serve the interests of justice for both the appellant and the complainant who are both entitled to a fair hearing before a court of competent jurisdiction.

95. Accordingly, the appellant's conviction is hereby quashed. The sentence is set aside. The file is remitted to Ukwala Principal Magistrate's Court for retrial of the appellant for the same offence.

96. The appellant is hereby bonded by the Court to appear before Ukwala Senior Resident Magistrate's Court for retrial on 19th December, 2019.

97. As this is not the first case I have remitted to the same court for retrial on similar grounds, I order that a retrial shall be heard before any other magistrate with competent jurisdiction at Ukwala PM's court, other than Hon. C.I. Agutu, SRM.

98. Orders accordingly.

Dated, signed and delivered at Siaya this, 9th Day of December 2019.

R.E. ABURILI

JUDGE

In the presence of

Mr Oduol H/b for Mr Rakewa Advocate for the Appellant

Appellant present in court

Mr Okachi Senior Principal Prosecution Counsel for the Respondent

CA: Brenda and Modestar