IN THE HIGH COURTOF KENYA AT MOMBASA

CORAM: D.S.MAJANJA J.

CRIMINAL APPEAL NO. 111 OF 2016

BETWEEN

DENNIS WILLIAM KIMANZI...................................APPELLANT

AND

REPUBLIC ....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.D. Ogoti, CM dated 5th September 2016 at the Chief Magistrate's Court at Mombasa in Criminal Case No. 1207 of 2014)

JUDGMENT

1. The appellant, **DENNIS WILLIAM KIMANZI,** faced three counts of defilement contrary to **section 8(1)** and **(2)** of the ***Sexual Offences Act*** ("the ***Act***"). According to the first count, it was alleged that on diverse dates between 14th June 2014 and 22nd June 2014 in Changamwe within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the vagina of EN, a child aged 9½ years. The second count alleged that on diverse dates between 14th June 2014 and 22nd June 2014 at Mikindani Village at Changamwe, he caused his penis to penetrate the vagina of AO, a child aged 12 years old. The final count alleged that on diverse dates between 14th June 2014 and 22nd June 2014 at Changamwe, he intentionally caused his penis to penetrate the vagina of JMJ, a girl aged 9 ½ years. The appellant was convicted on all the counts and sentenced to life imprisonment in respect of the 1st and 3rd count and for 20 years on the 2nd count to run concurrently. He now appeals against conviction and sentence.

2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions, all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). Bearing in mind this duty, I shall now set out the evidence as it emerged before the trial court.

3. After a voire dire, the first complainant, EN (PW 1) was duly affirmed. She told that court that the appellant pulled her into his house, told her to remove her clothes and proceeded to insert his penis into her vagina. She recalled that the appellant told her that he would stab her if she told anyone. There after he let her go. PW 1 further narrated that, the appellant found her again, pulled her into his house and a lady who saw her intervened and escorted her home and that is when she informed her mother of the order.

4. The complainant's mother (PW 5), told the court that she learnt that PW 1 had been sexually assaulted on the evening of 24th June 2014 when she heard commotion outside the house and found that PW 1 and the appellant had been placed in a police vehicle. She later learnt that PW 1 had been defiled. She took PW 1 to Coast General Hospital where she was examined and treated. PW 7 produced the P3 form, the Post Rape Care (PRC) form and the laboratory request. According to the PRC form which was filled on 25th June 2014, PW 1's external genitalia were normal although there were vaginal abrasions and hymen broken. The doctor who examined PW 1 on 9th July 2014, did not observe any physical injuries although he noted that the hymen was not intact though not freshly perforated.

5. The second complainant, PW 2, testified on oath that on a date she could not recall, the appellant called her and other children to his house to take cakes. When the children entered including PW 1, he bolted the door from inside and proceeded to sexually assault her. PW 2 further testified that thereafter, the appellant turned to her and told her to remove her clothes and proceeded to sexually assault her by inserting his penis into her vagina. After he had finished with her, he gave her Kshs. 10 and told her to come on another day. She recalled that her parents discovered the incident when PW 1 was found going back to the appellant's house. PW 2's mother, PW 6 also learnt on 24th June 204 that her child had been defiled by the appellant when he was arrested. She took the child to hospital for examination and treatment.

6. The medical report in respect of PW 2 were produced by PW 7. The PRC form was prepared on 25th June 2014. The examination revealed that her external genitalia were normal and the hymen was broken with a healing laceration on the anal orifice. The doctor who examined her prepared the P3 form noted that her hymen was not intact although it was not freshly perforated.

7. The third complainant, JM (PW 3), was affirmed after a voire dire. She told the court that on 22nd June 2014 at about 4.00pm, she was

playing with PW 1 when the appellant pulled them into his house and then proceeded to sexually assault them. She stated that he defiled PW 1 first. Thereafter, he inserted his penis into her vagina and when he was done he threatened them with stabbing if they told anyone. She told her mother when she reached home but her mother brushed her off.

8. PW 3's mother, PW 4 recalled that on 24th June 2014, she was informed that her daughter had been defiled by the appellant. She went to the appellant's house to confront him. They took him to the village elder who handed him to the police. She took PW 3 to hospital where she was examined and treated. According to the PRC form prepared on 25th June 2014, PW 3's external genitalia were normal but the hymen was broken and there was vaginal discharge. The doctor who filled the P3 form noted that her hymen was not intact and was not freshly perforated.

9. The investigating officer, PW 8, told the court that the appellant was arrested by Administration Police Officer from Mikindani AP and he investigated the matter by recording statements whereupon he charged the appellant.

10. In his sworn defence, the appellant denied the offence. He complained that he did not understand English and that the trial magistrate did not allow him to ask any questions. He testified that he was arrested from his house in the company of people who accused him of spoiling children.

11. Counsel for the appellant contended that the prosecution did not prove its case beyond reasonable doubt. As regards the first count, counsel submitted that the testimony of PW 1 was not corroborated and an essential witness was not called thereby vitiating the conviction. In respect of PW 2, counsel submitted that she was not subjected to a *voire dire* and as such it would to have been corroborated and was therefore worthless. As regards PW 3, counsel contended that the medical evidence relied upon to corroborate her testimony was at variance with the charges.

12. Counsel for the respondent supported the appellant's conviction on each of the counts. Counsel submitted that PW 1 gave cogent testimony which was corroborated. That the testimony of PW 2 was corroborated and that the testimony was PW 3 was cogent and corroborated. Counsel further urged that even where a voire dire was not conducted, the court could still convict on the basis of independent evidence. Counsel also relied on the provisions of **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***.

13. The main issue for determination in this appeal is whether the prosecution proved, beyond reasonable doubt, that the appellant defiled the complainant. In order to prove its case under **section 8(1)** of the ***Sexual Offences Act***, the prosecution must show that the appellant 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."*

14. The key evidence implicating the appellant was the testimony of the three children. Counsel for the appellant raised the issue whether the evidence of the complainants was properly received and evaluated in light of the law requiring that their testimony be corroborated. 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.*

15. 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 cases among them ***Johnson Muiruri v Republic*** **[1983] KLR 445** and ***Kinyua v Republic*** **[2002] 1 KLR 256** which 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 is possessed of sufficient intelligence and understands the duty of speaking the truth.

16. Further, it was established in ***Kibageny arap Kolil v R*** **[1959] EA 92**, and followed in subsequent cases that the phrase, *'a child of tender years'* means a child under the age of 14 years. It remains unchanged despite the definition of a child under the ***Children Act*** as the ***Oaths and Statutory Declarations Act*** specifically deals with the competence of children to testify rather than the rights of the child (see ***Samson Oginga Ayieyo v R*** **CA KSM Criminal Appeal No. 165 of 2006 [2006]eKLR**).

17. Finally, the consequence of whether testimony is sworn or unsworn is important. **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.*

18. In short, the general rule is that in order to support a conviction, the unsworn testimony of a child of tender years must be corroborated. However the proviso to **section 124** of the *Evidence Act* affords an exception in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim where for reasons to be recorded the court was satisfied that the child was telling the truth.

19. The next issue is what happens in cases where the trial court fails to follow the procedures for taking the testimony of a child? The authorities establish that failure to follow the prescribed procedure does not necessarily vitiate the trial. In ***DWM versus Republic*** **CA NYR App No. 12 of 2014 [2016] 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.*

20. 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; "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*

21. It is in light of the principles that I have outlined that I will consider the evidence. PW 1 was duly affirmed after a voire dire. Her testimony was clear on how she was subjected to an act of penetration by the appellant and the fact of penetration was corroborated by the medical evidence produced by PW 7. The appellant raised the issue that the lady who found PW 1 going into the appellant's house was not called as a witness. The law concerning the number of witnesses to be called was aptly summarized in ***Keter v Republic*** **[2007]1 EA 135** the court held that, "*The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.*" In this case, according to PW 1, she was intercepted when going to the appellant's house a second time. The testimony would not affect the tenor of the incident that had taken place earlier and the court would not make an adverse inference on the same regarding the evidence.

22. Although it was established that the PW 2 was aged 13 years, she was not subjected to a *voire dire* as she was child of tender years. The question for the court then is whether, there is sufficient independent evidence to support the charge (see ***DWM v Republic*** **(Supra)**). PW 2 also gave clear testimony on how the appellant lured her into his house and proceeded to sexually assault her. That evidence was in fact corroborated by the medical evidence.

23. PW 3 was affirmed and gave evidence on how she was sexually assaulted by the appellant. Although, the appellant submitted that the medical evidence by PW 7 showed that her anus was subjected to penetration and not the vagina, the report is clear is that the hymen was broken confirming penetration of the vagina.

24. In view of the conclusions I have reached, I am satisfied that the appellant was the person who sexually assaulted PW 1, PW 2 and PW 3 by causing an act of penetration. The appellant was not a stranger to them as he lived in the same locality, a fact he admitted in his defence. Further, the tenor of the evidence was that the appellant had been sexually assaulting them until he was caught. The children did not tell their parents of their order immediately due to the fact that they were threatened. They were firm when cross-examined and nothing emerged or was suggested to them that they were framing the appellant. In light of the prosecution's evidence, I also reject his defence suggesting that he was being framed as the three parents and children could not have planned to implicate him in such a serious offence.

25. I now turn to the age of the children as an ingredient of the offence of defilement. The import of age as an ingredient in the offence of defilement was discussed by the Court of Appeal in ***Moses Nato Raphael v Republic*** **NRB CA Civil Appeal No. 169 of 2014 [2015]eKLR** as follow;

> *On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in* ***Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010****, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.*

26. The is no doubt that PW 1, PW 2 and PW 3 were all aged below the age of 18 years, a fact confirmed by the fact that they were all in lower primary. It was not even suggested that they could be adult. The question then is what was the apparent age of each child for the purposes of imposing the appropriate sentence. The establishment of that age is a question of fact. It may be proved by a birth certificate or other documents like medical cards, medical evidence through an age assessment report, oral testimony of the parents and the child and observation by the trial court. was a child and the appellant did not suggest otherwise.

27. As regards PW 1, she testified that she was 10 years old. Her mother, PW 4, did not give evidence of her age and while PW 8 brought evidence of her clinic card, it was only marked for identification and not produced in evidence. I have no reason to doubt that PW 1 was aged 9 years at the time the offence was committed hence the sentence of life imprisonment imposed was within the bracket provided in **section 8(2)** of the ***Act***. PW 2 testified that her age was 13 years and that she was born on 3rd November 2001, a fact confirmed by her mother, PW 6. In the circumstances, the sentence imposed under **section 8(3)** of the ***Act*** was within the law and is affirmed. Lastly, PW 3 testified that she was born on 21st September 2002. Her mother, PW 3, confirmed as much and stated that when she did not have the birth certificate as these were taken by her ex-husband when they divorced. The sentence imposed in respect of the third count was within the law and is accordingly

affirmed.

28. Finally, in his defence, the appellant pointed out that he did not understand the proceedings as they were conducted in English and that he was not given an opportunity to cross-examine any witnesses. I have read the record and these allegations could not be further from the truth. The record shows that the witnesses testified in Swahili and were in fact cross-examined and the appellant did not raise any of these issues during the proceedings. This allegation lacks merit.

29. The appeal is dismissed.

DATED and DELIVERED at MOMBASA this 3rd day of September 2018.

D.S. MAJANJA

JUDGE

Mr Kenzi, Advocate for the Appellant.

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