REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 38 OF 2017

ERICK OTIENO OGANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the conviction and sentence by Hon. Kamau, C.M., Resident Magistrate

in Rongo Senior Resident Magistrate's Criminal Case No. 338 of 2016 delivered on 02/12/2016)

JUDGMENT

1. The Appellant herein, **Erick Otieno Ogango,** was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** No. 3 of 2006. He was also charged with an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. 3 of 2006. He denied all the charges and a trial was held.

2. The Appellant was found guilty, convicted and sentenced to life imprisonment. Being dissatisfied with the conviction and sentence, the Appellant preferred an appeal upon grant of leave by this Court.

3. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

4. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the written submissions.

5. In the course of discharging the duty I perused the record and came across an issue which although it was not canvassed by the parties, it is so fundamental to the justice system as it forms part of a fair trial. The issue is how the trial court handled the evidence of the complainant (PW1) who was allegedly a minor. PW1 testified on 05/08/2016. Before she testified the State informed the court that it had 3 witnesses and one was a minor aged 9 years old and since she was a child of tender years the State applied that PW1 gives unsworn statement. The court acceded to the request and, without undertaking a *voir dire* examination, proceeded to receive the unsworn evidence of PW1.

6. Without appearing to settle the issue of the age of PW1, when the court was informed that PW1 was a minor aged 9 years old then its attention ought to have been drawn to the provisions of **Section 19** of the **Oaths and Statutory Declarations Act, Chapter 15** Laws of Kenya and the legal jurisprudence on the aspect. The provision states as follows: -

> *(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, shall be deemed to be a deposition within the meaning of that section.***
>
> ***2) If any child whose evidence is received under sub-section (1) willfully gives false evidence in such circumstances that he***

would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.

7. However, since the **Oaths and Statutory Declarations Act** does not define a child of tender years, **Section 2 of the Children Act, No. 8 of 2011** defines such a child as one under the age of 10 years. That guidance has been relied upon with the caution that the definition is for the purposes of the **Children Act** and not necessarily applicable in criminal matters under the **Sexual Offences Act**. That position then called for the intervention of the courts. The question of who a child of tender years is has variously been a subject before the Court of Appeal and in the case of **Johnson Muiruri -vs- Republic (1983) KLR 445**, the appellate Court held as follows: -

"The matter whether a child is of tender years or not is a matter of the good sense of the court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression "child of tender years" for purposes of section 19 of the Oaths and Statutory Declarations Act (Cap 15)."

8. In the case of **Kibageny -vs- Republic (1959) EA 92,** the Court of Appeal rendered itself thus on the matter: -

"there is no definition in the Oaths and Statutory Declarations Ordinance of the explanation "child of tender years" for the purposes of Section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or an apparent age of under fourteen years."

9. From the foregone, it was incumbent upon the trial court to, at the very first instance, satisfy itself that PW1 was a child of tender years. Having so done, the court ought to have received the evidence of PW1 after conducting a *voir dire* examination.

10. The Court of Appeal elaborately explained the *voir dire* examination in the case of **Johnson Muiruri vs. R (1983) KLR 445** as follows: -

"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are rendered as witnesses. In Peter Kirigo Kiune, Criminal Appeal No.77 of 1982 (unreported) we said: -

"When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voir dire examination, whether the child understands the nature of an oath in which event sworn evidence may be received. If the court is not so satisfied, his unsworn 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 unless it is corroborated by material evidence in support thereof implicating him (Section 19, Oaths and statutory Declaration Act, Cap 15). The Evidence Act (Section 124, Cap 80). It is important to set out the questions and the 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, and not be forced to make assumptions."

11. In the case of **Oloo s/o Gai vs R (1960) EA 86**, the Court of Appeal noted that it could have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath.

12. In this case therefore, I equally hold the view that it was imperative that the trial court satisfied itself, through a ***voir-dire examination***, that PW1 was possessed of such knowledge and intelligence to tender evidence, understood the need to be truthful before court and whether he understood the nature of an oath before being allowed to give unsworn evidence. That decision must be made by the trial court and not by the State or the Prosecutor. To that end the trial court erred.

13. Having so found, this Court is to address itself on the best way forward. In the case of **Samuel Wahini Ngugi vs. R** (unreported) the Court of Appeal held as follows: -

"In our view, he needed even out of caution to have done so, noting that the child before him was aged twelve (12) years. The effect of the failure to strictly comply with those requirements on the trial will depend on the circumstances of each case. In the circumstances for the case, we find that the trial was vitiated, the conviction cannot stand and the sentence of 21 years imprisonment cannot also stand. Both are set aside."

14. Again, the Court of Appeal in **John Okeno Oloo -vs- R, Criminal Appeal No. 350 of 2003** (unreported) stated as follows: -

"In our view, whereas we agree that as concerns C, who was said was 13 years old, the trial court should have, note of caution, formed an opinion on a voir dire examination whether she understood the nature of an oath before she could be sworn. We do not agree with the superior court that failure to do so could not have occasioned miscarriage of justice had that been their only witness on the issue that was before the Court."

15. I have carefully considered the whole body of evidence and noted that PW1 was the sole eye-witness. Her evidence was therefore the bedrock of the case and even without any corroboration the trial court could still convict on that evidence in line with **Section 124** of the **Evidence Act, Cap. 80** of the Laws of Kenya. Closely linked to that observation was the gravity of the offence. The Appellant faced a life sentence on conviction. The evidence of PW1 was therefore such evidence which ought to have been received in the most careful manner as the rights of the Appellant remained guaranteed under the **Constitution** especially the unqualified right to a fair trial under **Article 50**. It is on that background and in the unique circumstances of this case that I find that since the crucial evidence of PW1 was not rightly received, the conviction is not safe and is hereby set-aside together with the life sentence.

16. As to whether the Appellant should be released or retried, my attention is drawn to the Court of Appeal decision in **Samuel Wahini Ngugi v. R (2012) eKLR** where the Court stated as follows:

> ***"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
>
> *'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'*
>
> ***That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported)when this Court stated as follows:***
>
> *"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."*

17. The admissible evidence or potentially admissible evidence, upon complying with the law in this case, and without going into the merits of it, is likely to lead to a conviction. The offences allegedly committed are not only very serious but also beastly and the innocent, helpless and vulnerable victim will no doubt be affected for the rest of her life more so whenever such memories take her back. The Appellant has now been incarcerated for about two years. That was from the time he was arraigned before the trial court to date. The witnesses in the case are within the complainant's family and neighborhood and as such it will not be difficult to trace them including the Clinical Officer and the Police.

18. This Court is therefore of the considered view that the ends of justice will be served by an order of retrial instead of discharging the Appellant. In view of the above unfolding events, dealing with the other issues in the appeal will not add any value.

19. Consequently, the Appellant will therefore be released into police custody and be produced before any court competent to try him except **Honourable Kamau, C. M.** This should be in the next 5 days of this judgment.

Orders accordingly.

DELIVERED, DATED and **SIGNED at MIGORI this 4th day of October, 2018.**

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Erick Otieno Ogango, the Appellant in person.

Joseph Kimanthi, Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant