**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 39 OF 2015**

**BAKARI SEIF.....……..……APPELLANT**

**VERSUS**

**REPUBLIC.....….……..RESPONDENT**

**JUDGMENT**

The Appellant, BAKARI SEIF, was charged with the offence of defilement of a child contrary to section 8 (1) as read with sub-section (2) of the Sexual Offences Act, No 3 of 2006.

The particulars of the offence being that;

> "Between January, 2013 and May, 2013 at (particulars withheld) location in Kwale County within Coast region, the appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of T.A a child aged 9 years".

The appellant was also charged with an alternative charge of indecent assault of a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars were that:

> "Between the months of January 2013 and May, 2013 at (particulars withheld) location in Kwale County within coast region, the appellant unlawfully and intentionally touched the breast and vagina of T.A, a child aged 9 years with his penis".

The appellant was arraigned in court on 26th June, 2013, when he took pleas and he denied both charges. After a full trial, the appellant was found guilty and convicted for the offence of defilement whereby he was sentenced to serve a life imprisonment. There was no finding made in respect of the alternative charge.

The conviction and sentence aggrieved the appellant and he filed a petition of appeal citing four (4) grounds, which he later amended as follows;

> (1) That the learned trial magistrate erred in law and fact in finding his conviction and sentence without considering that section 19 of the Oaths and Statutory declaration Act was not considered.
>
> (2) That the learned trial magistrate erred in the rule of law by convicting him without seeking that the charge of defilement was not proved to the standard of law hence the sentence and conviction was unsafe.

(3) That the learned trial magistrate erred in law and fact by arriving to his conclusion without considering that the prosecution did not prove its case beyond reasonable doubt for the mentioned witnesses that is Mariam and the fish lady were not summoned to support the prosecution's case.

(4) That the learned trial magistrate erred in law and fact in failing to consider his reasonable defence statement.

He prayed for his appeal to be allowed, conviction quashed and sentence set side.

To determine the appeal, this being the first appeal court, the evidence that was tendered before the trial court will be briefly analyzed.

The prosecution called a total of six (6) witnesses before closing its case and the appellant was placed on defence having been found to have had a case to answer. He opted to give an unsworn statement in defence.

Pw1, TAHS testified as Pw1 and narrated what happened. She told court that she knew the appellant as he used to buy food from her grandmother who used to sell chips at the road side near their home. She stated that the appellant showed her his house. She said that he went to their home to buy food and gave her money to go to Shamis. He then directed her to his home and asked her to follow him. He then led her into his house through the front door and then to his bedroom where he undressed before her and then removed her pant. That then he asked her to lie on the stomach. Pw1 said that he just stood naked in front of her then turned her to the front. He touched with his "mdudu" then turned her behind and again touched her with his "mdudu". That he wiped her after this but had hurt her. Pw1 told court the appellant did this to her repeatedly and it is her aunt who found out what was happening and told her grandparents and mother. Her family took her to the police station and then to hospital. She also said that this had happened for a long time and the appellant had asked her not to tell anyone about it.

During cross examination, Pw1 said that she never screamed when being defiled because he was doing it "pole pole" and no one found them except for the fish lady who did not say anything she also said that the appellant would take her from home after school at 12.00 noon and he would send Mariam to call her. She further said that he gave her Ksh 20.

Pw2, TK, identified herself as the complainant's grandmother and told court that she lives with her. He told court that the complainant is a standard one (1) pupil at [Particulars Withheld] primary school. She told court that she had come from Dar es Salaam when Z, who is an aunt to the complainant reported to her that a neighbor by the name Kigoli told her that he had been seeing the appellant with Pw1 and that he had defiled her. Pw2 said that she asked Pw1 to tell her the truth and she told her what used to happen and how the appellant had threatened to take her to the police so she was afraid. Pw2 said she checked Pw1 and saw she was defiled. She then went to the Vanga AP's office where the child was questioned and told to go to Lunga Lunga hospital where the doctor checked and confirmed that Pw1 had been defiled. They then went to Msambweni Hospital Pw2 identified the P3 form she was issued, the birth certificate No. [particulars withheld] showing Pw1 was born on 11.12.2004, a clinic card, treatment sheets. She confirmed that she knew the appellant as he used to get food from their home and send the child. She said that she never doubted him and even once she saw Pw1 walking oddly and she thought she had urinated on herself.

Pw3, a clinical officer by the name PHILIP KIBET CHEBII, of Msawmbweni District Hospital identified a P3 form in the name of T.A who he stated that he examined on 23.6.2013. He said that she was aged 9 years old. Pw3 said that he established that the Complainant's hymen was absent and the vagina wall was bruised. He also confirmed that there was no discharge, no venereal disease, no pregnancy, HIV negative, and syphilis negative. However, he concluded that the absence of the hymen was indicative of a penetrative sexual act. He also testified that he examined the appellant and found that the urinalysis test removed pus cells. While the HIV and syphilis tests were negative. He filled and signed the P3 forms on 25.6.2013 and produced them as exhibits. He also identified the treatment notes which he used to fill the

P3 form and produced them as exhibit P4. He produced the other treatment forms and P3 form in respect of the appellant as exhibit P3 (a) and (b).

Pw4, KIJOLI ALI RAJAB testified that on 23.6.2013 at around 1.00pm, she was cleaning outside her home when she saw T.A, the complainant , coming out of the appellant's house. She said that the complainant is aged about 8 years and is not related to the appellant. She then told Pw2's relative to look into why Pw1 was going to the appellant's house.

Pw5, NO. 2009034739 APC PATRICK MUNENE, testified that on 24.6.2013 he was at his office when he received a report from a woman by the name TK that her grandchild had been defiled by BAKARI, the appellant. He said that she was with the child, T.A and he recorded their statement and commenced investigations. And on 25.6.2013 at about 7.15am, he arrested the appellant.

Pw6, No.64492 CORPORAL JOEL ANDAWA of Lunga Lunga police station testified that on 7.7.2013 he passed through the occurrence book and saw he had been allocated a case involving one T.A a child from [Particulars Withheld] primary school, who and been taken there on allegations of defilement. He referred them to Lunga Lunga dispensary for treatment and issued them with a P3 form which was filled at Mswambweni District Hospital. He told court what was reported to him by the child and her grandmother. He then produced the birth certificate showing that Pw1 was born on 11.12.2004 and was 9 years old at the time of the alleged incident, as exhibit P1. He also produced the clinical cards as exhibit P2.

In cross examination, Pw6 told court that he did not go to the scene of incident as there was no reason since time had passed by, these things having started in February, 2013.

The prosecution closed its case and the trial magistrate found a prima facie case had been established against the appellant and placed him on his defence.

The appellant, BAKARI SEIF opted to give an unsworn statement in defence and called no witnesses. He stated that he did not understand why he was in court. He said that on 11.12.2012, he was arrested while taking breakfast at a hotel and was not willing to fight with the police. He was then brought to court with the charges.

In her judgment, the trial magistrate in evaluating the evidence to establish if the prosecution had proved their case against the appellant beyond reasonable doubt, stated at paragraphs 27 to 29 of page 3 of the judgment tha:

> "Thus indeed a penetrative act did happen to the minor. The age of the minor was also proved and this was noted by the production of Exhibit P Exhibit 1, and P Exhibit 2, being the birth certificate of the minor and the clinic card.

She went on to find at line 36-37 of page 3 to line 1 to 3 of page judgment that;

> " …she also identified the accused as the one who defiled the minor. Aside from the minor a second party has positively identified the accused. I note that the accused was properly identified by Pw1 and Pw4. I do not have any reason to doubt this positive identification of the accused by the complainant , T.A as her defiler as well as her evidence before this court"……Further medical evidence was indicative of a penetrative act on the minor as her vaginal walls were torn, pus cells in the urine and also her hymen was missing. There is sufficient evidence by the prosecution beyond all reasonable doubt"

The trial court found the appellant guilty and convicted him on the main charge of defilement. He was sentenced to life imprisonment.

At the hearing of this appeal, the appellant who had filed written submissions, highlighted on the same. He stated that there was no evidence against him to show that he was the one who defiled the

complainant.

M/s Ocholla, learned counsel for the state opposed the appeal and urged the court to confirm the conviction and sentence since the prosecution had proved all the ingredients of the offence of defilement against the appellant

This being the first appeal, I am obligated to re –examine, re-evaluate and analyze the facts and evidence of the trial court while being aware that I did not have a chance of observing the witnesses demeanor. (See OKENO VRS REPUBLIC (1972) E.A 32.

The first grounds of appeal is that section 19 of the Oaths and Statutory Declarations Act was not considered. This section of the law deals with voire dire examination which is essentially a pre-testimony procedure that is conducted to establish whether a witness who is of tender years is intelligent enough to comprehend the nature of an oath and importance of telling the truth in court. How a voire dire examination is conducted was set out by the court of Appeal in the case of JOHNSON MUIRURI (1983) KLR 445 where the lordships held interalia that;

> "2. It is important that set out questions 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 procedure is rightly decided;
>
> 3. The judge or magistrate as the case may be is under a duty to record the terms in which he was persuaded and satisfied that the child understands the nature of an oath and importance of telling the truth. The failure to do so is fatal to the conviction".

The out come of this procedure which depends on how the witness answers the questions posed to him/her by the court will guide the court in evaluating whether the witness understands the meaning of an oath and hence if he/she can be sworn or if he or she simply appreciates the meaning of telling the truth and hence can adduce unsworn evidence.

I have read through the record of the trial court and at page 5 of the proceedings from the 13 line of pages 5 to line 3 of page 6, there are proceedings with the heading preliminary examination of a child of tender yeas. Therein, it indicates that the trial magistrate conducted an examination of Pw1, and at the end of page 6 at lines 1 to 3, the court stated as follows;

> "I have listened to the child and assessed the child. She is of tender years but is aware of the consequences of truth or not. I certify that the child can give a sworn statement"

The child proceeded to be sworn in Kiswahili and gave her sworn evidence and was cross –examined by the appellant.

From the record of the trial court, while conducting the voire dire examination of the child, the trial magistrate only recorded Pw'1s (child's) answers. She did not record the questions she posed to Pw1.

It is worth noting that while section 19 of the Oath and Statutory Declaration Act makes provisions for administration of voire dire examination for children of tender years before receipt of their testimony, it does not in itself provide for the format to be applied in the course of such administration. The format to be applied has evolved through case law.

In the case of SULA VRS UGANDA (2001) E.A 556, the Supreme Court of Uganda approved the formats.

The first one is where the trial court can write the questions put to the witness and the answers of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue.

In the second format, the court may opt to record the question put to the witness but record the answers verbally in the first person and then make its conclusion .

In the more recent case of PATICK KATHURIMA VRS REPUBLIC, NYERI CRA 137 OF 2014, the court after reviewing case law on the subject observed thu:

> "It is best though not mandatory in our context that the questions put and the answers given by the child during voire dire examination be recorded verbatim for the benefit of the Appellate court which must satisfy itself on whether the important procedure was properly followed".

There are no hard and fast rules set by the KATHURIMA case on the format of administering voire dire examination.

In this instant case, the trial court only recorded the response given by the child and after evaluating the answers given by the child, made an observation whereby it recorded that it is satisfied that the child was aware of the consequence of truth or not and certified that the child could give a sworn statement.

From the record of the trial court at page 6 lines 1 to 3, it is clear that the court observed that the child was aware of the consequences of truth or not and the trial court proceeded to certify that the child could give a sworn statement. In the absence of that finding by the trial court on whether or not the child ( Pw1) understands the meaning of an oath , then the only right thing to have been done was for the trial court to allow her to give unsworn statement. This is not what happened. As such, I allow the first ground of appeal.

The second ground of appeal is that the offence of defilement was not proved to the required standard.

In DOMNIC KIBET MWARENG VRS PREPBULIC, KITALE HIGH COURT CRIMINAL APPEAL NO 155 OF 2011, the trial court spelt out the ingredients forming the offence of defilement as;

(a) The age of the complainant;

(b) proof of penetration ;

(c) positive identification of the assailant.

The first ingredient was proved by the prosecution by the production of the complainant's certificate of birth ( Exhibit P1 ) and Notification of birth (clinic card Exhibit P 2) both of which indicated that the complainant was born on 11th December, 2004 and this was 9 years old at the time of the alleged offence, that is January to May, 2013.

The second ingredient is that the prosecution has to prove that indeed there was penetration by the assailant at the particular time. According to the P3 form, that was produced by the prosecution, it was indicated that the labia and cervix were intact but the hymen was absent ( perforated ). In cases of defilement, courts mainly rely on the complainant's evidence which must be corroborated by medical evidence. The Pw3 form (Exhibit P4) further shows that there was no discharge, blood or venereal disease noted. And the section for additional remarks by the doctor was filled and it was noted therein that since the hymen was perforated and absence of it confirmed that there was penetrative sexual act.

I have also noted from the P3 form (Exhibit P4) that it does not indicate whether there were any injuries on the child's private parts. All it indicates is that the hymen was perforated and no indication of the type of weapon causing the injury. In fact, that part of the P3 form is cancelled, that is , there are cancelled writings.

It is worth noting that offence of this nature normally occur in secret, hence most times the only eye witness is the complainant. In such circumstances of no eye witness, then the medical report goes on to corroborate the evidence of the complainant.

I have already established that in this case, the child ought to have given unsworn statement/testimony which was to be corroborated. I have also noted that Pw4 was an eye witness but she only saw the complainant leaving the Appellant's house. She said that she questioned pw1 about that and this led to Pw1 confirming that she had been defiled by the appellant, hence his being charged.

I therefore find that a conviction on the basis of corroboration by the P3 form as filled would be unsafe. Also the fact that the complainant stated that the appellant defiled her on more than one occasion should be treated with extreme caution as it many have well been intended to fill the gaps in the prosecution 's over and especially with regard to the P3 form ( Exhibit P4).

The third ingredient is about positive identification of the culprit and in the case before the trial court, the complainant identified the appellant as her assailant by stating that she knew him because he used to buy food from her home. However, in view of the above, positive identification above, is not enough to convict on a charge of defilement. It is imperative that all the three ingredients be proved.

The appellants third ground of appeal is that there were two witnesses who were mentioned but were never summoned to testify in this case before the trial court. In discharging their duty of showing a case beyond reasonable doubt. The prosecution has a duty to call witnesses that will ensure that this duty is discharged. There is no rule cast in stone as to the number of witnesses the prosecution must call to prove their case. The courts have previously held that it's not important but the prosecution call a multiplicating of witness to prove a case once the same has been proved by a witness. However, in the event that there is a gap that has been left or certain contradictions have been raised in their case, the prosecution therein ought to call witnesses to clarify such in order to assist the court in establishing the true position.

It is noted that Pw1 mentioned that a lady referred to as "the fish lady" sent her to the appellant's house and that one Mariamu was sent by the appellant to call her. The appellant has raised issue with the fact that these two were not called whereas according to him, these two were alleged to have coordinated the meeting between the complaint and himself. An evaluation of the records reveals no such thing. The testimony of the complainant was only to the extent that "the fish lady" saw her at the Appellant's house and that the Appellant sent one Mariamu to call her. I doubt that calling the two ladies would have added probative value or advantage to the appellant's case.

The last ground of the appeal was that the trial court did not consider the appellant's defence. For the reason given earlier in this judgment with regard to the other grounds of appeal, have disposed of the appeal. It would therefore be an academic exercise to dwell into the ground.

In light of my findings in the first, and second grounds of appeal, I find that the prosecution did not prove the charge against the appellant and it was therefore unsafe for the learned trial magistrate to convict the appellant on the evidence that was adduced before the trial court.

According, I allow the appeal, quash the conviction and set aside the sentence that was imposed upon the appellant.

I proceed to direct that the appellant be set at liberty forthwith, unless otherwise lawfully held.

**Judgment delivered, signed and dated this 3rd day of May, 2017.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/s Ocholla for the state

Appellant in person

C/clerk- Kiarie