REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 246 OF 2012

TSUMA RAI ….....….....….. APPELLANT

VERSUS

REPUBLIC ……..…….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 289 of 2006 of the Senior Resident Magistrate's Court at Kwale – **Hon. Ogembo - SRM**)

JUDGMENT

TSUMA RAI hereinafter referred to as the appellant was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement of a girl contrary to section 145(1) of the Penal Code.

The particulars are that:-

> ***"On the 29th day of January, 2006 at 3:00 p.m. At [Particulars withheld] Village in Kwale County he had carnal knowledge G B a girl under the age of fourteen (14) years".***

The grounds for this appeal are that Section 200 of the Criminal Procedure Code was not complied with.

Secondly, that no Voire dire examination was conducted before the evidence of the Complainant was admitted.

Further that the Conviction was against the weight of evidence adduced.

A perusal of the record of proceedings show that this matter was partly heard by Honourable Maindi Senior Resident Magistrate at page 13 line 3 of the record of proceedings it is shown that Section 200 of the Criminal Procedure Code was complied with as a result of which the Accused requested that the matter do commence afresh. The Court granted the request and ordered that it start ***De Novo.***

At page 17 line 23 the learned trial magistrate observed,

> ***" I have seen the complainant. She is indeed a very Small girl. On being asked, she says " I am G B. I am six (6) years old. I do not go to school. I stay at home with (keeps quiet). I do not know about any date. In view of the Complainants condition. I do rule that she may give unsworn evidence".***

What can be deduced from the above is that the trial Court did conduct a Voire dire examination on

the Complainant before admitting her evidence.

Secondly, that the learned trial magistrate did comply with Section 200 of the Criminal Procedure Code and the Accused requested that the case be heard De Novo which request was granted. The appellant cannot be heard therefore to state that he was prejudiced.

As the first appellate Court this Court has the solemn duty of analysing and re-evaluating the evidence before the trial Court. See **Okeno – Vs- Republic (1972) EALR.** Page 32 wherein it was held,

> ***"It is the duty of a first appellate Court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the Judgment of the trial Court should be upheld".***

From the outset it is noted that the Appellant was charged with defilement of a girl contrary to section 145 (1) of the Penal Code.

The particulars show that the offence was committed on 29th January, 2006. The Sexual offences Act No. 3 of 2006 came into commencement on 21st July, 2006. The charge was therefore not defective.

Upon a careful evaluation of the evidence on record, the age of the child does not appear to be in dispute. The trial magistrate at page 17 line 23 had also observed,

> ***" I have seen the Complainant. She is indeed a very small girl".***

The Complainant had told the Court that she was aged six (6) years at the time of the incident. Her elder brother (PW 2) had also testified on the age of the Complainant as six (6) years.

On the issue of penetration, the Complainant a child of tender years did testify at page 18 line 4 thus,

> ***" He removed my underwear and then he put dirt in my private parts".***

Her elder brother also told the Court at page 19 line 2,

> ***" I heard Accused calling G. I saw him call G inside the house. The door was not closed. Then I heard G crying..... I saw whitish discharge from her vaginal area. When I asked her what had happened, she told me Tsuma had inserted his penis inside her. I then saw the Accused come out of the house with his zip open".***

The evidence of the two children of tender years is corroborated by the Doctor who examined the Complainant and who found that she had a mildly swollen labia majora, inflamed labia minora, superficial bleeding trivial wounds around the hymen, though the hymen was still intact. He was of the view that there was forceful failed penetration.

Section 2 of the sexual offences Act defines penetration to mean,

> ***" The partial or complete insertion of the genital organs of a person into the genital organs of another person".***

It is therefore in material in the circumstances of this case that there was a failed forceful penetration. Partial or the slightest penetration is adequate penetration.

In conclusion, I find that the Conviction was safe and there is no need to interfere. The Sentence is legal. The appeal has no merit and its disallowed.

Judgment delivered dated and signed in open Court this **5th** day of **March, 2014.**

…..

M. MUYA

JUDGE

5TH MARCH, 2014

In the presence of:-

Leaned State Counsel Miss Mutua

Appellant in person present

Court clerk Musundi