



REPUBLIC OF KENYA



KENYA LAW
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**Oduma v Republic (Criminal Appeal 31 of 2018)
[2024] KECA 1434 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1434 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 31 OF 2018
S OLE KANTAI, FA OCHIENG & WK KORIR, JJA
OCTOBER 11, 2024**

BETWEEN

JOHN OKOTH ODUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the conviction and sentence of the High Court at Nakuru
(Maureen Odero, J.) on the 13th day of April, 2018 in H. C. CRA NO. 100 of 2012)*

JUDGMENT

1. This is a second appeal by the appellant, John Okoth Oduma, from his original conviction and sentence by the Chief Magistrate's Court, Nakuru, where he was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* it being alleged that on the date and place named in the charge sheet he unlawfully and intentionally committed an act by inserting his male genital organ (penis) into the female genital organ (vagina) of ENM, a child aged 11 years which caused penetration. He was tried convicted and sentenced to life imprisonment and his first appeal to the High Court of Kenya, Nakuru, failed on conviction but was allowed on sentence the first appellate court sentencing him to serve 20 years imprisonment.
2. Being a second appeal our mandate is circumscribed by section 361(1) *Criminal Procedure Code* to deal with issues of law only and resist the temptation to go into facts of the case which have been considered by the trial court and re-appraised on first appeal. That mandate has been the subject of many judicial pronouncements by this Court in such cases as *Stephen M'Irungi & Another vs. Republic* [1982 – 88] 1 KAR 360 where it was held of that mandate:

"Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with



the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

3. In home made 'Supplementary Grounds of Appeal' in compliance with section 64(1) cap 9 of the *Court of Appeal Rules* (sic) the appellant says, amongst other things:

"My Lords, I wish to submit that my conviction is unsafe, this is due to the fact that while conducting the trial, the learned trial magistrate failed to conduct a *voire dire* examination on PW1 EN (name concealed) who was ten (10) years.

The particular (sic) of the charge sheet that placed her at the age of (11) eleven years, when giving evidence she told the court she was (10) ten years old "see page 10 line 5", I am EN 10 ten years old, PW IV testified as a father of PW1. He stated the minor was 10(ten) years old. "see page 13 line 11", PW1 is my daughter she is (10) ten years old..."

4. The record shows that when the matter was called for hearing on 30th November, 2011 before Resident Magistrate B. Kituyi the Court Prosecutor stated that he had 2 witnesses ready for hearing and PW1 (ENM) was put to the witness box, was sworn and no *voire dire* was conducted. She stated that she was 10 years old and her cousin, who testified as PW2, stated that she (PW2) was 16 years old. Again, no *voire dire* was conducted on PW2.

5. The appellant complains in this appeal that he was tried and convicted on the evidence of a 10-year-old child where no *voire dire* examination was conducted. We found this to be an issue of law calling for our consideration.

6. Section 19 of the *Oaths and Statutory Declarations Act* provides for how evidence of young children is to be taken. It provides:

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.

2. If any child whose evidence is received under subsection (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. This Court faced with a situation where *voire dire* had not been conducted by the trial court had this to say in the case of *Lomaisia vs. Republic* [2023] KECA 148 (KLR);

"The fact that the trial court did not subject PW1 to a *voire dire* examination is not in dispute. What is in contention is whether such a failure is fatal to the evidence of PW1. Section 19 of the *Oaths and Statutory Declarations Act* which the appellant relied upon is concerned with the reception and admissibility of evidence of a child of tender years. The said section declares that where the child does not, in the opinion of the court understand



the nature of an oath, his evidence may nonetheless be received though not given upon oath."

8. And in the earlier case of *Maripett Loonkomok vs. Republic* [2016] eKLR, we said:-

...that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. 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 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." (underline added)

9. In the case before the trial court PW1 stated that she was 10 years old. No voire dire examination was conducted. The only other evidence was by her 16 year old cousin who attended the scene when she heard PW1 screaming. The assailant had fled the scene. A Clinical Officer examined PW1 later and confirmed that she had been defiled.
10. The trial court failed to conduct voire dire examination on PW1 who was a child of tender years. There was no independent evidence to support the charge. The appellant has raised an issue of law that he was convicted on evidence of a child of tender years who was not subjected to voire dire examination. This is a valid complaint. There was no independent evidence on which the conviction could be reached and the conviction is unsafe in those circumstances. The appeal on conviction succeeds on this ground alone.
11. The appellant was presented for plea at the Chief Magistrate's Court, Nakuru on 21st February, 2011 and was convicted in the undated judgment. The 1st appeal judgement is dated 13th November 2017. PW1 who was 10 years old in 2011 would now be of the age of majority and there would be no place for a voire dire examination to be conducted if a new trial is ordered. We find that this is an appropriate case to order a retrial, the appeal having succeeded only because of the procedural impropriety where voire dire examination was not conducted and there was no independent evidence on which the conviction could be founded.
12. The final orders that we make are that the conviction made against the appellant is hereby quashed and sentence set aside. The appellant will be presented before the Chief Magistrate, Nakuru, for a fresh hearing to be conducted by a magistrate different from the magistrate who conducted the trial. The presentation shall be done within 14 days of today.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

F. OCHIENG



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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

