**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OKWENGU, WARSAME & GATEMBU JJ. A)**

**CRIMINAL APPEAL NO 153 OF 2016**

**BETWEEN**

**JACKSON AMWAYI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the High Court of Kenya at Kakamege (**Njoki Mwangi, J**.) dated 26th *May, 2016 in* **H.C.CR.C. NO. 285 of 2012)**

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**JUDGMENT OF THE COURT**

[**1**] **Jackson Amwayi**, the appellant, is aggrieved by the judgment of the High Court (**Njoki Mwangi, J**) upholding his conviction and sentence of life imprisonment by the Senior Principal Magistrate Court at Hamisi for the charge of defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**.

[**2**] In his memorandum of appeal the appellant faults the High Court for failing to find that the prosecution failed to prove its case beyond reasonable doubt; that the trial court did not comply with provisions of Section 19 of the Oaths and Statutory Declaration Act, section 150 of the Criminal Procedure Code, and section 302 of the Criminal Procedure Code. In addition, that the High Court failed to note that the trial court did not comply with Article 50(2)(c) (j) of the Constitution nor did he consider section 36 of the Sexual Offences Act.

[**3**] The appellant also filed written submissions in which he maintained that the prosecution case was not proved beyond reasonable doubt; and that there were procedural infractions during the trial that rendered the appellant's conviction unsafe. These included: miscarriage of justice due to the failure of the trial court to indicate the language in which the proceedings were undertaken; the failure of the trial court to carry out a voire dire examination of the complainant who was a minor of tender age; breach of the appellant's constitutional rights through failure to avail the appellant evidence that the prosecution intended to rely upon, and failure to avail the appellant the opportunity to cross examine witnesses; and finally failure to note that the appellant's defence was not given due consideration.

[**4**] This being a second appeal, this Court's jurisdiction is as provided for under ***Section 361(1)(a)*** of the **Criminal Procedure Code,** limited to only matters of law. As reiterated by this Court in **Karani vs. R** [2010] 1 KLR 73**:**

> **"By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law**."

[5] Further, as held in **Adan Muraguri Mungara vs. Republic** [2010] eKLR, this Court:

> **"……..has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."**

**[6]** With the above in mind we find it appropriate to first address the issue of procedural infractions. The appellant complained that the

hearing was not done in a language he could understand and the proceedings were not interpreted to him. The record reveals that on the first day when the appellant took his plea it is recorded that the charge was explained to him in Kiswahili language and he responded in the same language. During the hearing, although the language in which the proceedings were conducted is not recorded, there was a court clerk who attended the court at all times, and apart from EK the appellant cross examined the rest of the witnesses. As the appellant did not complain about lack of interpretation, it is apparent that the proceedings were either interpreted to him or conducted in a language that he understood. Indeed, he did not raise this ground before the first appellate court. We would therefore reject this ground.

[**7**] In regard to the procedural infractions we are concerned about the evidence of EK which was primarily implicating the appellant. EK, who was the victim of the alleged violation was a minor, who according to the charge sheet was 9 years old. **Section 19(1)** of the Oaths and Statutory Declarations Act provides for the taking of the evidence of a child of tender years 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 (Cap. 75), shall be deemed to be a deposition within the meaning of that section."**

[**8**] As to whether EK was a child of tender years, we reiterate what this Court stated in **Patrick Kathurima vs Republic** [2015] eKLR regarding who is a child of tender years:

> **"Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this Court in MOHAMMED –VS- REPUBLIC [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in KIBANGENY –VS- REPUBLIC (Supra) that the expression "*child of tender years*" for the purpose of Section 19 of the [Act] means, *"in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years."* That indicative age has been followed by courts ever since, See, for instance, JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445, where this Court, in respect of a 131/2 year old child approved the step taken by the trial court:**
>
> **'The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth'.**
>
> **We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children Act defines a child of tender years to be one under the age of ten years. That definition is preceded by the words *"In this Act, unless the context otherwise requires…".* That definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."**

[**9**] This means that going by EK's age as reflected in the charge sheet, she fell within the bracket of a child of tender years, and the trial magistrate was obliged to comply with the provisions of section 19(1) of the Oaths and Statutory Declarations Act, by carrying out a *voir dire* examination and noting his observations in regard to the competence of the child to testify. This examination is what was to guide the trial court in determining whether the child could testify and in what manner.

[**10**] A careful perusal of the original record of the proceedings of the trial court shows that the minor testified as the second prosecution witness. The record does not reflect any *voir dire* examination or any observations made by the trial magistrate, nor does it indicate whether the witness gave sworn or unsworn evidence, or the language in which the minor testified. Clearly, the evidence of EK was irregularly taken as the trial magistrate did not carry out any *voir dire* examination, nor did he form any opinion as to whether EK understood the nature of an oath or was of sufficient intelligence and could appreciate the importance of speaking the truth.

[**11**] Another serious infraction is the fact that the appellant does not seem to have been given an opportunity to cross examine EK. The record shows that after EK gave her evidence in chief the next witness was called to testify. Regardless of whether EK gave sworn or unsworn evidence, the appellant had the right to cross examine EK and challenge the evidence adduced against him. Failure to accord him this opportunity was prejudicial to him and a violation of his right to a fair trial under Article 50(2)(k) of the Constitution.

[**12**] In **Maripett Loonkomok vs. Republic** [2016] eKLR, the Court considering the effect of failure to administer a *voir dire* examination rendered itself as follows:

> **"We turn to consider the effect of failure by the trial court to administer *voir dire* on the complainant. It is firmly settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that the question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014…"**
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> **This Court has recently in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically 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 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.'" Underlining added**

[**13**] Similarly, in **DWM –vs- Republic** [2016] eKLR, the Court observed as follows:

**"14. There was however no hard and fast rule laid down by this Court in the *Kathurima case* (supra) that in all cases where *voir dire* procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-**

"It is best though not mandatory in our context that the question put and the answers given by the child during the voir dire examination be recorded...."

**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.**

(Emphasis added)

**15. The failure to give sworn evidence notwithstanding, *H.W.* was subjected to cross-examination by the appellant. In *Sula versus Uganda (supra*) the supreme court of Uganda ruled that:**

'A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.'

**16. In Nicholas Mutula Wambua & another versus Republic *Mombasa Criminal Appeal No. 373 of 2006 (UR)* this Court when confronted with a similar issue construed Sections 208 and 302 of the Criminal Procedure Code governing trials in the subordinate court and the High Court respectively and arrived at the conclusion that cross-examination of a witness who had given evidence not on oath is permitted by law. The Court approved the view taken by the Supreme Court of Uganda in the *Sula case (*supra) that cross-examination of a child who gives evidence not on oath is meant to test the veracity of such child's evidence. In the *Nicholas Mutula case (supra)* the Court went over the responses given by the child witness both during the *voir dire* examination and in cross-examination of his/her unsworn testimony and then observed thus:-**

'But in our evaluation, the answers the child gave during the voir dire were intelligent. He understood that it was wrong to lie. His evidence was coherent;' **and on that account allowed the child's testimony to stand."**

[**14**] The sum total of the above decisions which we reiterate, is that the failure of the trial court to conduct a *voir dire* examination on a witness of tender years is a procedural irregularity which may vitiate a trial. However, whether it vitiates the trial or not is dependent on peculiar circumstances of the case. Where there is other sufficient evidence that can meet the threshold of proof beyond reasonable doubt without the questioned evidence being taken into account, the conviction can still be upheld notwithstanding the irregularity in the process.

[**15**] In the circumstances before us the trial magistrate not only did not carry out a *voir dire* examination but also failed to accord the appellant the opportunity to cross examine the witness and this caused serious prejudice to the appellant as his right to fair trial was breached. In her judgment the learned judge of the first appellate court did not address this irregularity nor did she specifically re-evaluate the evidence of EK, but merely reproduced what the witnesses had stated during the trial and concluded as follows:

**"Following an analysis of the evidence that was tendered before the trial court, I am satisfied that the prosecution discharged its burden of proof beyond reasonable doubt. Although PW2 was taken to hospital 18 days after the commission of the offence, this was attributable to her Aunt Flora to whom she reported the incident to. The said Aunt made no effort to have the appellant arrested by reporting him to the police. The Clinical officer found that PW2's hymen was broken, which was evidence of penetration.**

**I am satisfied that the person who perpetrated the offence against PW2 was the appellant herein. At the time the offence occurred, PW2 was 9 years old as she was born on 4th June, 2002 as per prosecution exhibit 2 which was issued in respect to her as a 'birth certificate, by the Religious Society of Friends (Quakers). The sentence applicable is therefore life imprisonment."**

[**16**] As was stated in **Okeno vs. Republic** [1972] EA 32:

**"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA.**

> **570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

[**17**] Therefore, the learned Judge of the first appellate Court had the obligation to subject the case against the appellant to a fresh analysis by reconsidering and evaluating the evidence in order to arrive at her own conclusion. It is evident that the learned judge failed to consider the fact that the conviction of the appellant was dependent on the evidence of EK the sole witness who identified the appellant as the person who violated her. There was no doubt that EK was violated, as this was corroborated by the medical evidence. However, corroboration was lacking with regard to the identity of the person who violated EK.

[**18**] **Section 124** of the **Evidence Act** which requires corroboration of evidence of minors that is taken in accordance with **section 19** of the **Oaths and Statutory Declaration's Act**, has a proviso that states as follows:

> **"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

[**19**] This means that the proviso excluding corroboration could only be applicable in the case of EK if the trial magistrate believed that she was speaking the truth and gave specific reasons why she believed that EK spoke the truth. Unfortunately, neither the trial magistrate nor the learned Judge of the first appellate court addressed the issue of identification, nor did they give any reason as to why they believed EK spoke the truth when she identified the appellant as the perpetrator of the offence. It is evident that the learned Judge did not subject the evidence which was adduced in the trial Court to a fresh and exhaustive analysis. Had the court done so, it would have noted that the trial magistrate did not properly take the evidence of EK and also failed to comply with the proviso to Section 124 of the Evidence Act as he gave no reasons for accepting the evidence of EK.

[**22**] The last question we need to answer is whether we should remit matter for re-trial. The principles regarding when an order for retrial may be ordered were stated in **Fatehali Manji v. The Republic** [1966] EA 343 as follows:

> **"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;"**

[**23**] Although there was a defect in the appellant's trial, the trial was strictly not illegal nor was it a nullity as the appellant's conviction could be sustained if the other evidence adduced by the prosecution was sufficient to prove the charge to the required standard. However as observed above the other evidence is not sufficient to prove the charge against the appellant as EK was the only person who identified him, and even assuming that the trial was illegal an order of retrial would be prejudicial to both the appellant who would be expected to stand a new trial after serving almost 8 years' imprisonment, and EK who would have to relive the ordeal that she went through more than 8 years ago and which ordeal she may possibly have recovered from.

[**24**] For the aforestated reasons, we are constrained to allow the appeal against both conviction and sentence. Accordingly, we quash the conviction and set aside the sentence imposed on the appellant. He shall be released forthwith unless otherwise lawfully held. Those shall be the orders of the Court.

**Dated and delivered at Nairobi this 24th day of July, 2020.**

**HANNAH OKWENGU**

**……..……**

**JUDGE OF APPEAL**

**M. WARSAME**

**……..……**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb.**

**……..……**

**JUDGE OF APPEAL**

I certify that this is a true *copy of the original*

*Signed*

**DEPUTY REGISTRAR**