IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 13 OF 2017

BETWEEN

ALFONCE KOSGEI ROTICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Eldoret ***(Kimondo, J.)*** *dated* ***14th June, 2016***

in

H.C.CR.A. No. 188 of 2012)

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JUDGMENT OF THE COURT

[1] This is an appeal arising from the judgment of the High court, (Kimondo, J) dismissing the appellant's appeal, against his conviction and sentence by the Resident Magistrate's Court in Eldoret, for the offence of defilement contrary to **section 8(1)&(2)** of the **Sexual Offences Act**. The victim of the offence was **EN (name withheld)** a child alleged to be 8 years old.

[2] During the trial, four witnesses testified. These included **EN** her guardian **PNM (P), Doctor Cynthia Kibet (Dr. Kibet)** of Moi Teaching & Referral Hospital and **PC John Kimanga** of Kiambaa Police Station who was the arresting officer.

[3] The facts leading to the appellant's conviction were that the appellant was employed as a domestic worker cum herd's boy at the home of EN. On the material day EN and her five year old sister were in the house alone, when the appellant went to the house. Upon confirming that there was no one else in the house, he took EN to her bedroom, asked her to undress and lie on the bed and despite EN's protestation he penetrated her using his penis. He then warned EN not to inform her guardian. The next day, EN informed P what had happened and P reported the matter at Kiambaa police station and took EN to Moi Teaching & Referral Hospital. EN was examined by **Dr. Florence Jaguga**, who filled her P3 form which was produced in evidence by Dr. Kibet as Dr. Jaguga had gone to South Africa for further studies. In the P3 form, Dr. Jaguga estimated EN's age as seven (7) years and noted among other things, that her hymen was widened and torn at 3 O'clock position and that there was evidence of penetration of EN's vagina.

[4] The appellant in his unsworn statement of defence, denied the offence, and stated that he had worked as a herder for EN's family for 2 months and had sought permission to travel home but before he could go, he was arrested.

[5] In his judgment the trial court found that EN gave a candid testimony of what the appellant had done to her; that there was sufficient evidence that the appellant penetrated EN's vagina with his penis; that the medical evidence which included injuries to EN's private parts, torn hymen, and reddened orifice was consistent with EN's evidence; that there was no evidence of any frame-up as there was no bad blood between the appellant and EN's family; that the issue of mistaken identity did not arise as the appellant was known to EN; and that the offence occurred between 5 and 5.30p.m. when there was daylight. She therefore rejected the appellant's defence, found him guilty, convicted him of the offence defilement and sentenced him to life imprisonment

[6] In his appeal to the High Court, the appellant raised 9 grounds in which he faulted the trial magistrate for failing to take into account his age in sentencing and failing to consider his mitigation; in mis-directing herself as to the purpose and intent of v*oire dire* examination of a child witness; and in holding that the prosecution had proved its case to the required standard.

[7] Upon hearing and considering the appeal, the High Court found that the appellant was not prejudiced by the case starting *de novo* under **section 200(3)** of the **Criminal Procedure Code** as the new magistrate had the advantage of hearing the evidence of all witnesses; that there was no evidence that EN was coached when she gave evidence the second time; that the trial court adopted the correct procedure of taking EN's evidence; and that the trial was not unfair to the appellant as it was conducted in Keiyo and Kiswahili languages which the appellant understood.

[8] In evaluating the evidence that was adduced before the trial court, the learned judge found that EN knew the appellant as he had worked for them for over a month; that the appellant was at the *locus in quo* and was identified by EN; that EN gave credible evidence that the appellant penetrated her with his penis, and this was corroborated by Dr. Kibet and the P3 form; that the defence of the appellant was hollow and a red herring; that the evidence was clear that EN was born on 8th September, 2003 and therefore was 8 years at the time of the offence. He therefore concluded that the appellant's conviction was safe and dismissed the entire appeal.

[9] Dissatisfied with the judgment of the High court, the appellant filed the instant appeal in which he assailed the judgment of the High Court on 6 grounds. The grounds included that the learned judge erred: in holding that the prosecution case had been proved beyond reasonable doubt; in holding that the legal requirement for a *voire dire* examination were met; in holding that there was corroboration of the minor's evidence; in holding that it was proper for the proceedings to be undertaken in a language other than the language the appellant elected to be used in the proceedings; and in failing to address or properly address the issue raised on the non-compliance with **section 200 (3)** of the **Criminal Procedure Code**.

[10] When the matter came up for hearing **Mr. Momanyi** appeared for the appellant, while **Ms. Karanja,** prosecution counsel appeared for the respondent.

[11] Mr. Momanyi, counsel for the appellant relied on written submissions which had been duly filed and which he orally highlighted. He maintained that the case against the appellant was not proved beyond reasonable doubt; that EN testified on two occasions and her evidence was not consistent and this was not addressed by the court; that the *voire dire* examination of EN was not properly done; that while the first magistrate concentrated on the issue of the tender age of the minor, the second magistrate did not address the issue of the intelligence of the minor to speak the truth; and that there was no corroboration of EN's testimony although she was the only eye witness.

[12] Further, counsel submitted that the medical evidence was insufficient as it did not specify the age of the alleged injuries or the object used to penetrate the vagina of the child nor was any DNA done to link the appellant with the alleged offence; that the appellant indicated to the court that he only understood Keiyo language but the proceedings were conducted in English and Kiswahili and this caused a miscarriage of justice; that the case was heard by two magistrates and that under **section 200(3)** of the **Criminal Procedure Code**, it is the appellant and not the prosecution who had the right to elect whether to proceed with the trial or recall witnesses or start *de novo*; that it was not open for the court to review directions which had been given at the appellant's request for hearing to proceed from where the previous magistrate had left the proceedings. The court was therefore urged to allow the appeal.

[13] In opposing the appeal, Ms. Karanja submitted that the prosecution had proved its case beyond reasonable doubt, that the issue of the minor's evidence was addressed at length by the learned judge of the High Court who concluded that the second magistrate had the benefit of hearing the evidence of all the witnesses and there was therefore no miscarriage of justice; that EN being only 8 years old, she may not have been able to narrate everything when she testified the first time; counsel maintained that the second magistrate gave the appellant a chance to make an election and he did so; that **section 124** of the **Evidence Act** is clear that corroboration is not necessary if the court is satisfied that the child is speaking the truth; and both the trial court and the first appellate court concluded that EN was speaking the truth; and that the appellant was represented by counsel throughout the trial and he gave a detailed defence in the Kiswahili language and therefore it was clear that he understood the proceedings.

[14] This being a second appeal, **section 361(1)** of the **Criminal Procedure Code** obliges us to consider only questions of law. In ***Karani vs Republic [2010] 1 KLR 73***, this Court expressed itself as follows:

> ***"This is a second appeal. 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."***

[15] We have carefully considered the record of appeal, the submissions by the appellant and counsel for the respondent, the authorities cited and the law. The questions of law that commends itself for our determination is whether the appellant was subjected to a fair trial; whether the *voire dire* examination carried out on EN was proper; whether the High Court properly discharged its duty of re-considering, analyzing and re-evaluating the evidence that was adduced before the trial court, and came to its own conclusion; and whether all the elements of the charge against the appellant were established.

[16] The issue of fair trial was addressed at length by the learned judge of the High Court. In this regard the judge stated as follows:

> ***"13. The appellant contends that he did not understand the proceedings. I have carefully studied the original record of the trial court. The charge was first read to the appellant on 11th August, 2011. The appellant said he understood Keiyo language, the lower court called for a Keiyo interpreter. The substance of the charge and its elements were read to the appellant. The appellant answered 'it is not true'. A plea of not guilty was entered. Throughout the trial, the appellant was represented by an***

advocate. He cross examined all the witnesses. When he was put on his defence, the record shows he gave unsworn statement in Kiswahili.

14. The obvious inference is that the appellant knew both Keiyo and Kiswahili languages. Mitigation was tendered by his learned counsel. Granted those circumstances, I am unable to hold that the trial was unfair or that the appellant did not understand or comprehend the proceedings. See ***Abdalla vs Republic [1989] KLR 456, Kyato vs Republic [1986] KLR 418, Lusiti vs Republic [1976-80] 1KLR 585, Desai vs Republic [1974] EA 416, Adan vs Republic [1973] EA 445, Kariuki vs Republic [1984] KLR 809."***

[17] On our perusal of the record of the trial court, we cannot but agree with the learned judge. Under **Article 50 (2)(m),** an accused person's right to fair trial includes the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial. In this case, although the appellant chose to have the proceedings at the time of the plea, translated to him in Keiyo language, it is evident that the appellant understood Kiswahili language which most of the witnesses testified in. The appellant was represented by counsel and did not at any time complain to the trial court about the language used. As stated by the learned judge, he gave his unsworn statement in his defence in Kiswahili language.

[18] Article 50(2)(m) does not require the court to provide an interpreter for a language which the appellant prefers but to provide an interpreter if the appellant does not understand the language used at the trial. It was clear that the appellant understood Kiswahili language. His right was therefore not breached.

[19] We reiterate what was stated by this Court in **Antony Kamau Githuka v Republic Nairobi Criminal Appeal No. 330 of 2007** that:

"For the proposition that for the Court to nullify proceeding on account of lack of language used during the trial, it must be clear from the record, beyond doubt that the accused did not at all understand what went on during his trial." See **George Mbugua Thiongo v Republic (2013) eKLR.**

[20] Another aspect of the right to fair trial that arose in this appeal was the application of **section 200(3)** of the **Criminal Procedure Code** in regard to the taking over of the trial by another magistrate and the de novo hearing. It was contended that the appellant having elected that the trial should proceed from where the former magistrate had left it, the succeeding magistrate had no jurisdiction to direct that the trial begins afresh. We have considered this argument but find that in our view it defeats the logic of a fair trial. The basis of an election is to give the incoming magistrate an opportunity to understand the evidence so that the accused person is not prejudiced by the change of the officer presiding over the trial. The evidence of EN who was the complainant and the critical witness was the one whose evidence had been taken at the time the new magistrate took over. The prosecutor felt that there was need to have EN recalled. The appellant's advocate had no objection, and the new magistrate agreed to have EN recalled. We do not see what prejudice the appellant suffered. If anything, the recall was in the interest of justice as it provided the new magistrate with a better opportunity to appreciate the evidence and rule in a fair and just manner. We therefore reject this ground.

[21] As regards the *voire dire* examination, it is interesting that the examination done by the first magistrate on 22nd September 2011, and the one done by the second magistrate on 14th March 2012 revealed different results. The first magistrate found that EN could not understand the nature of an oath, and the second magistrate found that she understands the nature of an oath. However, we do not find this to be contradictory. First, the witness was slightly older than she was when she first appeared in court. Secondly, having appeared in court before, she may have been more confident the second time than she was the first time. Thirdly, there is no particular format for carrying out a *voire dire* examination. In **Patrick Kathurima v Republic,** Nyeri Criminal Appeal No. 137 of 2014, this Court after reviewing case law on the issue of *voire dire*, observed as follows:

"It is based though not mandatory in our contest that the questions put and the answers given by the child during voire dire examination be recorded verbatim as opined by the English Court of Appeal in Regina vs Compell (Times) December 20, 1982 and Republic vs Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

[22] It is evident that a voire dire examination is a subjective examination depending on the opinion of the magistrate carrying out the examination, and the questions put to the witness from which the magistrate makes her/his conclusion as to whether the child understands the nature of an oath, and if not whether the child is intelligent enough to understand the importance of speaking the truth. Both magistrates who examined EN carried out the *voire dire* examination properly and nothing therefore turns on this ground.

[23] The learned judge of the High Court was alive to his duty, to re-evaluate all the evidence on record and draw his own conclusion as a first appellate court. He properly guided himself using several authorities including **Okeno vs Republic [1972] EA 32.** Upon reconsideration of the evidence, the learned judge stated thus:

"22. A number of matters arise from that evidence. The first relates to identification. The appellant had complained they were not complete strangers. The appellant was employed by her guidance as a herdsman that was confirmed by PW2. The appellant had been employed for over a month. The complainant knew the appellant as Kosgei. The appellant did not contest those facts. He was at the locus in quo. The offence took place at about 5.30p.m. that to me is the evidence of recognition stronger than that of identification. See Wamunga vs Republic [1989] 424, Republic vs Turnbull & Others [1976] 3 All ER 549, Obuona & Others vs Uganda [2009] 2EA 333.

23. The complainant gave testimony on oath. She did not waiver upon cross examination. She was consistent. I thus find that the complainant positively identified the appellant as the person who called her into the bedroom and defiled her. A child of her age may not describe sexual acts in a graphic manner but in this case she sufficiently described the act in the following terms ' he asked me to un dress and lie on the bed. He then did 'did bad manners' to me. I felt pain, I bled (witness pointed to her private

parts and said 'the appellant did manners with his thing which he uses to kususu (urinate).

24. I have conclusion that the complainant positively identified the appellant; and, that the appellant penetrated her with his penis; …"

[24] The above extract provides a clear demonstration that the learned judge properly re-evaluated and subjected the evidence to a fresh analysis. This analysis included an analysis of the medical evidence and the evidence of the other witnesses as well as an analysis concerning the issue of age of EN. We are satisfied that the learned judge cannot be faulted in this regard.

[25] Section 8(1) of the **Sexual Offences Act No. 3 of 2006** states as follows:

"A person who causes penetration with a child is guilty of an offence termed defilement."

[26] This means that the elements for the offence of defilement are:

(i) that the victim is a child.

(ii) that there has been penetration of the child's genital organs, by the genital organs of the perpetrator (such penetration need not be complete or absolute as partial penetration suffices).

(iii) that the perpetrator of the offence is established to be the accused person.

[27] In other words for the offence of defilement to be proved to have been committed, the prosecution must prove each of the above ingredients beyond reasonable doubt. It was contended by the appellant that the prosecution did not discharge this burden of proof. However, as already noted from the judgment of the High Court there was sufficient evidence that the appellant was properly identified by EN as the person who had caused his penis to penetrate her vagina. This evidence was consistent with the medical evidence that was adduced and the P3 report.

[28] Moreover, a trial court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone, if it believes the victim is truthful and records the reasons for that belief. This is as per the proviso to **section 124** of the Evidence Act 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."

[29] In **J. W. A. v Republic [2014] eKLR**, this court observed:

"We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

[30] A similar position was taken in **Mohamed v Republic [2006] 2 KLR 138** where the Court stated:

"It is now settled that the courts shall no longer be hamstrong by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

[31] We come to the conclusion that all the elements of the offence of defilement were established against the appellant to the required standards and that the evidence was sufficient to sustain his conviction. The learned judge did not find it appropriate to disturb the sentence. It is clear to us from the proceedings that the trial magistrate deliberately exercised her discretion in imposing the sentence against the appellant. We therefore equally have no reason to interfere.

[32] The upshot of the above is that we find no merit in this appeal and do therefore dismiss it in its entirety.

Dated and delivered at Eldoret this 25th day of July, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.