IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 70 OF 2015

BETWEEN

GODFREY OLUOCH OCHUODHO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Migori ***(D. S. Majanja, J),*** *dated* ***8th May, 2015*** **in HCCRA No. 17 of 2015)**

JUDGMENT OF THE COURT

The appellant was charged with two counts of defilement contrary to **Section 8(1)** as read together with **Section 8(2)** of the **Sexual Offences Act**. The particulars were that on the night of 14th and 15th June, 2014 at [Particulars withheld] sub location, within Migori County in the republic of Kenya intentionally caused his penis to penetrate the anus of EO, a child aged 9 years and the anus of FO, a child aged 10 years.

Consequently, the appellant upon arrest was arraigned before the Chief Magistrate's Court at Migori. The appellant denied the charges leading to a trial in which the prosecution called a total of 5 witnesses in support of its case. The case was hinged on the testimony of the complainants, which was as follows;

PW1: EO

"I am EO. I am aged 9 (nine) years old. I am a student at [Particulars withheld] in class 3. On 15/6/14 around 12 midnight I had gone to watch football that night at Kamuseti. After the match Godie decided to take us home where it was late. I was with FO. We agreed to go with him. He was taking us home. Before we got home we arrived where he stays he opened his radio loudly. In the middle of the night he sodomized me. I began screaming but no one came to my rescue. He told me to keep quiet because he promised to give me money the following day….."

PW2: FO

"I am FO I am 9 years old. I school at [Particulars withheld] Primary School. EO is my neighbour. On 15/6/14 around midnight. We had come from watching a match. Godie offered to escort me home. We got near his home. It was with EO (sic). He then decided we sleep in his house. He opened the radio loudly. We shared a bed all of us. He then slept between us and sodomized EO first then he did the same to me also……."

The other prosecution witnesses were **PW3, LA**, the mother of EO; **PW4, Ochango Manoah**, a clinical officer; and **PW5, Police Constable Ahmed Abdi.**

The magistrate (E. M. Nyagah, PM) evaluated the evidence tendered before the court and convicted the appellant under **Section 215** of the **Criminal Procedure Code** and sentenced him to life imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The appeal was heard by D. S. Majanja, J. who by a judgment delivered on 8th May, 2015 upheld the conviction and dismissed the appeal.

Further aggrieved, the appellant filed the instant appeal complaining that the judge erred in law and fact by;

a) Failing to find that the prosecution did not prove its case beyond a reasonable doubt.

b) Upholding the conviction and the sentence which was based on inconsistencies and contradictions.

c) Failing to appreciate that the trial court erred by not subjecting the appellant to a medical examination to link him to the offence.

d) Failing to observe on which count the trial magistrate sentenced the appellant to life imprisonment for.

e) Failing to find that the trial court erred by failing to ascertain the ages of the complainants.

During the hearing of the appeal, the appellant appeared in person while the respondent was represented by **Mr. Sirtuy**, the learned Principal Prosecution Counsel. Both did not file written submissions. The appellant relied on his grounds of appeal and did not submit orally to the Court.

In opposing the appeal, **Mr. Sirtuy**, stated that this being a second appeal, it is limited to points of law only. The appellant could not raise issues herein that were not raised earlier as that amounts to an afterthought. In answer to an enquiry by the Court, counsel, stated that the *voir dire* was sufficient and was lawfully administered. The appellant was in a fiduciary relationship with the complainants. The use of the term sodomized is a matter of semantics.

As this is a second appeal, our jurisdiction is confined to consideration of questions of law only by dint of **section 361(a)** of the **Criminal Procedure Code**. In ***SAMUEL WARUI KARIMI V REPUBLIC [2016] eKLR,*** this Court affirmed this position;

> ***"This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."***

The threshold of what constitutes matters of law has been well settled by the Supreme Court in ***GATIRAU PETER MUNYA V DICKSON MWENDA KITHINJI & 3 OTHERS [2014] eKLR***;

> ***"[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:***
>
> ***a. the technical element: involving the interpretation of a constitutional or statutory provision;***
>
> ***b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;***
>
> ***c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."***

The issues of law distilled for consideration and determination herein are whether the prosecution proved its case beyond a reasonable doubt and whether *voir dire* was administered procedurally.

For defilement to be proved, the prosecution has to demonstrate that penetration took place. So long as there is penetration whether only on the surface, that ingredient of the offence is demonstrated (See ***MARK OIRURI MOSE V REPUBLIC [2013] eKLR***). In sexual offences cases, a trial court relies primarily on the testimony of the complainant so long as it satisfies itself on the minor's intelligence which goes to competence and that he or she knows the importance of taking an oath or at least of telling the truth, which goes to whether the minor would give sworn or unsworn evidence. This practice in criminal cases is entrenched in **Section 19** of the **Oaths and Statutory Declarations Act**;

> ***(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.***

It has also been provided for in **Section 124** of the **Evidence Act**;

> ***Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***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.***

Since an accused person can be convicted based solely on the testimony of a victim, trial courts ought to meticulously and procedurally administer *voir dire* on minors, to avoid a miscarriage of justice. This Court in ***JAPHETH MWAMBIRE MBITHA V REPUBLIC [2019] eKLR,*** commented on the role of *voir dire* as follows;

> ***"Voir dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary). With specific regard to the testimony of children, voir dire examination is essential to enable the court satisfy itself that the child is conscious of the truth."***

Before convicting an accused person, the court must satisfy itself that the complainant is telling the truth and is sufficiently intelligent to give an account of the crime that was committed. That is meant to ensure that a conviction is safe, as it will be based on the clear, truthful and factual account of a minor.

From the record, the trial magistrate recorded the *voir dire* as follows;

> ***"MALE MINOR (EO): I do know the meaning of taking an oath. It means I shall state the truth.***
>
> ***COURT: Minor knows the meaning of taking an oath and is duly sworn in."***
>
> ***"PW2: MALE MINOR: yes I know what it means to take an oath. It means I shall state the truth.***
>
> ***COURT: Minor duly sworn."***

The issue before the Court is whether the above constituted a procedurally administered *voir dire*. According to the prosecution, the trial magistrate conducted the same procedurally. Whereas there is no law detailed or regulation that has laid out the procedure of conducting *voir dire*, to its last minutiae, this Court has on several occasions pronounced itself on what constitutes a proper and procedural *voir dire*. In ***JAMES MWANGI MURIITHI V REPUBLIC [2016] eKLR,*** it was held;

> ***"10. The need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in section 19 of the Oaths and Statutory Declarations Act cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In Sula versus Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer 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 omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter:-"***

It is important to reproduce the holding in ***JOHNSON MUIRURI VS REPUBLIC [1983] KLR 445,*** which detailed the importance and procedure of administering *voir dire* as follows;

> ***"1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.***
>
> ***2. It is important to set out the 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 matter was rightly decided.***
>
> ***3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.***
>
> ***4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.***
>
> ***5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."***

It has been held by this Court that it is not necessary for the trial court to record the questions posed to the minor, as the answers in response are sufficient. Nonetheless, it is good practice for the trial court to record the questions and responses verbatim for the benefit of the appellate courts. This was held in ***PATRICK KATHURIMA V REPUBLIC [2015] eKLR****;*

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

From the record before this Court, the answers recorded by the trial court are not evidence of a proper *voir dire*. Both complainants gave one

or two brief sentences in response to its questions which did little to indicate their intelligence and understanding of an oath nor the importance of telling the truth.

We further note that the complainants are recorded as having each used to term 'oath' in their responses. The complainants were 9 years and 10 years old, we do not expect that they were intelligent enough to know what an oath is. It is odd and improper for the trial magistrate to have asked them about an 'oath', as such, when all he should have done is find out by gentle probing if they had a moral apprehension of the need to be truthful. Their responses do not sufficiently show their level of intelligence, whether they understood what it meant to tell the truth and the consequences of not telling the truth.

Given the doubts and misgivings we have expressed, we cannot confidently state that *voir dire* was properly administered and, inevitably, a conviction based on the testimony of the two minors is unsafe. This is in line with the conclusion reached in ***PATRICK KATHURIMA V REPUBLIC*** (Supra);

> ***"DK's evidence was in the circumstances improperly received. Without it, as the State rightly conceded, there is nothing left sufficient to found the appellant's conviction."***

Our finding that *voir dire* was not properly administered, leaves the prosecution's case with no legs to stand on, and ought to be dispositive of this appeal, but one other aspect of the case has troubled us.

We acknowledge that the complainants may well have been able to identify the appellant by recognition, they both called him by his nick name *'Godie'* which is a common derivative of Godfrey. We are also satisfied with the corroboration of their testimonies on the events that took place leading to the alleged commission of the offence the appellant was convicted of. We think with respect that, a child, cannot possibly know the meaning of the word 'sodomize', yet the record reflects that both of them used the same word, a technical term really, in their testimonies. The record does not indicate whether the trial magistrate sought for clarification on the finer details of what the complainants thought the term meant, if at all they used it, in order to ascertain the minors used the term appropriately and accurately to mean that the appellant penetrated them in the anus. Actual penetration is the primary ingredient required by law for a successful conviction. From the record, the testimonies of the complainants were not cogent in so far as they did not clearly show that the appellant actually caused his penis to penetrate them in the anus as he was charged.

Given the unsatisfactory state of the evidence, the appellant's conviction is unsafe and is accordingly quashed. The sentence is also set aside. The appellant shall accordingly be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 31st day of October, 2019

ASIKE-MAKHANDIA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.