IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, SICHALE & KANTAI, JJ.A)

CRIMINAL APPEAL. 125 OF 2015

BETWEEN

MATHEWS OTIENO OBONGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment and Sentence of the High Court of Kenya at Kisumu ***(H. K. Chemitei, J.)*** *dated 11th March, 2015*

in

HC.CR. A NO. 126 OF 2013

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JUDGMENT OF THE COURT

[**1**] **Mathews Otieno Obongo** (hereinafter referred to as the appellant) was tried, convicted and sentenced to life imprisonment by the Senior Principal Magistrate Court at Nyando for the offence of defilement contrary to **section 8(1)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that he had defiled MA (name withheld) a child aged 9 years. His appeal against conviction and sentence was dismissed by the High Court at Kisumu (**Chemitei, J**).

[**2**] Being aggrieved, he has now lodged this appeal before us in which he has raised four grounds, contending that the learned Judge erred in upholding the judgment of the trial court even though the prosecution evidence was marred with inconsistencies and did not meet the standard of proof required. In addition, the appellant faulted the learned Judge in failing to find that the evidence did not support the charge against him; and in upholding a sentence that was excessive, harsh, unconstitutional and unlawful.

[**3**] The trial magistrate found that there was sufficient evidence that MA was defiled and that the culprit was the appellant. He also found that there was an attempt to defeat the course of justice by hiding MA. Accordingly, he convicted the appellant.

[**4**] On his part, the learned Judge of the High Court found that MA spoke the truth; that it was the appellant who defiled her. He rejected the appellant's contention that his constitutional rights had been violated, and concluded that there was no merit in the appeal.

[**5**] We have perused the record of the trial court and do note that the trial magistrate carried out *voire dire* examination and came to the conclusion that MA was of tender age and that she would give unsworn evidence. The trial magistrate then proceeded to take the evidence of MA. At some stage the appellant had to be removed from the court and kept at a window outside the court from where he could follow the proceedings. This was because MA appeared traumatized by his presence and could not talk in his presence. The record further indicates that MA proceeded with her evidence and that after she finished, the appellant was brought back in court and the evidence was read to him as a formality. The appellant was not given any opportunity to cross-examine MA.

[**6**] We find that there were two infractions from the procedure adopted by the trial magistrate. The purpose of a *voire dire* examination before taking the evidence of a child of tender years, is first to determine whether the child understands the nature of an oath and if so, the evidence may be received as sworn; and secondly, to determine if the child does not understand the nature of an oath, whether she is possessed of sufficient intelligence and understands the importance of speaking the truth, in which case, the evidence may be received as unsworn. Although the trial magistrate conducted a *voire dire* examination, and received MA's evidence as unsworn, the magistrate did not form any opinion as to whether MA was possessed of sufficient intelligence to testify, and whether MA appreciated the importance of speaking the truth. Secondly, after MA testified, the trial magistrate did not give the appellant the opportunity to cross-examine MA. Under

Article 50 (2)(k) of the **Constitution**, the right to fair trial encompasses the right of an accused person to challenge the evidence adduced against him through cross-examination. The appellant therefore, had the right to challenge the evidence adduced by MA through cross-examination, and the failure to allow the appellant to cross-examine MA was a violation of the appellant's right to a fair trial thereby resulting in a mistrial.

[**7**] The circumstances of this matter were very tragic. MA, a child of nine years was brutally defiled. It was alleged that the appellant who is apparently her uncle, was the culprit. Evidence was adduced that MA's labia minora and majora had lacerations and that she had a perianal tear and the hymen was broken and rugged. She was admitted in hospital for 13 days. At some stage, there was interference with the trial and the child was spirited away and hidden. It took the intervention of the court and an organization called CRADLE, for the child to be found and the hearing to proceed. We recognize that justice in criminal trials is not justice for the accused person alone, but also justice for the victim.

[**8**] In the old case of **Fatehali Manji v The Republic [1966] EA 343**, it was held by the former Court of Appeal for Eastern Africa that:

> **"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."**

[**9**] We have agonized on the best order to give in this matter and have come to the conclusion that although the offence was committed about seven (7) years ago, witnesses can still be available and the ends of justice will be best served through an order of retrial.

[**10**] We therefore declare that the trial in the magistrate's court was a mistrial, quash the appellant's conviction, and set aside the sentence of life imprisonment imposed on him. We direct that the file be referred back to the trial court and the appellant be produced for hearing by a magistrate other than the one who heard the case.

Those shall be the orders of the Court.

Dated and delivered at Kisumu this 21st day of November, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR