IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, MUSINGA & GATEMBU, JJ.A.)

CRIMINAL APPEAL NO. 55 OF 2016

BETWEEN

JOHN NDACHU NG'ANG'A……..…...…….....APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi by Kimaru, J. dated the 21st May, 2015) in H.C.CR.A. NO. 51 OF 2013)

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JUDGMENT OF THE COURT

1) This is a second appeal by John Ndachu Ng'ang'a, *(the appellant)*, following the dismissal of his appeal by the High Court against his conviction and sentence by the Principal Magistrate's Court at Githunguri, for the offence of defilement contrary to ***Section 8 (1) (2)*** of the ***Sexual Offences Act No. 3 of 2006 Laws of Kenya***.

2) The particulars of the charge against the appellant were that on the 15th day of December, 2011 at around 5.45 pm at [Particulars withheld] village in Githunguri District of Kiambu County; the appellant intentionally caused his penis to penetrate the vagina of XYZ, a child aged 11 years.

3) During the hearing, the appellant denied the charge and the prosecution called a total of four witnesses in support of its case. The appellant gave unsworn evidence and did not call any witnesses. The trial court having considered the evidence found that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and sentenced him to life imprisonment.

4) Aggrieved by the decision of the trial court, the appellant lodged an appeal in the High Court. The learned Judge of the High Court, (Kimaru, J.), having re-considered the evidence that was tendered before the trial court, concluded that the evidence was sufficient to prove the charge against the appellant. The learned Judge therefore dismissed the appeal and upheld the appellant's conviction and the sentence imposed against him by the trial court. This precipitated the second appeal to this Court that is now the subject of this judgment.

5) The appellant's memorandum of appeal, sets out five grounds of appeal as follows:-

"a) That the High Court Judge made an error by failing to consider the entire evidence afresh as a first appellate court and as a result arrived at a verdict which was not supported by the evidence on record.

b) That the High Court Judge made an error in law by failing to observe that the trial proceeded on a defective charge rendering the trial a nullity.

c) That the High Court Judge made an error when he failed to observe that the conviction was manifestly unsafe considering the fact that no evidence linked or connected me to the instant case.

d) That the case for prosecution against me was not proved beyond reasonable doubt as required by law in such cases of the nature of capital sentences.

e) That the High Court Judge made an error in law by failing to evaluate my cogent defence that the same was not considered by the trial magistrate when convicting me hence failed to observe that the provisions of section 169 (1) of the CPC was not complied with".

6) When the matter came up for hearing before us, the appellant added the following four supplementary grounds of appeal:-

"a) That the High Court Judge erred in law and grossly misdirected himself by failing to adequately subject the medical evidence adduced in the trial court and as a result failed to observe that no documentary evidence was officially produced and marked as an exhibit as law demands.

b) That the High Court erred in law by failing to observe that the trial court never conducted a voir dire examination on the victim minor.

c) That the omission by PW3 to officially produce documentary medical evidence of the victim child (P3 form) rendered the case for the prosecution as not proved to the required standard needed in law.

d) That my fundamental rights to a fair and impartial trial as enshrined by Article 25(c) of the Constitution was violated due to the omission to produce P3 form by PW3".

7) The appellant, who was unrepresented, appeared in person before us but made his arguments by way of written submissions. First, the appellant while relying on the case of ***Okeno vs Republic, (1972) EA. 32***, submitted that the learned Judge erred in law and misdirected himself by failing to adequately subject the medical evidence to a thorough and exhaustive scrutiny. The appellant argued that Scholastica Wambui, who appeared as PW3, failed to produce the P3 from and nowhere in the record is it indicated that the P3 form was marked for identification. The appellant further argued that the failure to mark the P3 form for identification was a crucial irregularity which went to the root of the entire case. The appellant contended that had the learned Judge evaluated the entire evidence on record he would have found that PW3 merely wished to produce the P3 form but never in the real sense produced it.

8) Secondly, the appellant submitted that the learned Judge erred by failing to observe that the trial Magistrate did not conduct a *voir dire* examination of the minor to ascertain whether she was intelligent enough to give a sworn statement or whether she knew the nature of the oath. The appellant argued that in view of the victim's age a *voir dire* examination was important and ought to have been conducted as required by law. The appellant contended that the omission by the two courts below to consider the salient aspect of *voir dire* examination was fatal to the prosecution's case. In conclusion, the appellant prayed that he be granted the benefit of doubt because of the failure by the trial court to conduct a *voir dire* examination and the non-production of the P3 form.

9) The Assistant Director of Public Prosecutions, Mr. Wanyonyi, appeared for the respondent and made

oral arguments opposing the appeal. Counsel submitted that the P3 form was marked for identification by the complainant, (PW1), and later PW3 confirmed having signed it and produced it. Counsel argued that no objection was raised even in cross-examination. Counsel contended that the trial Court analysed the evidence regarding the P3 form and concluded that there was evidence of penetration. Counsel further elaborated that the High Court on its part re-evaluated the evidence on the P3 form and made a similar finding of penetration.

10) On the issue of *voir dire* examination, Counsel submitted that though the examination was not conducted, the child was sworn and gave evidence. Counsel contended that the court saw her and established she was telling the truth. Learned Counsel argued that the child recalled evidence while testifying; she identified her underpants and when cross examined the appellant tested that evidence. Counsel contended that the court found that PW1 had no ill will against the appellant and that she was truthful and candid. Counsel argued that no prejudice was occasioned by absence of *voir dire* examination.

11) In response to respondent's submissions, the appellant brought in the issue of his age and submitted that the same was not established.

12) We have duly perused the record of appeal. We have also considered the respective submissions of the appellant and the respondent as well as the authorities cited.

13) ***Section 361*** of the ***Criminal Procedure Code*** enjoins this Court to consider matters of law only when hearing and determining a second appeal. In ***Karingo v Republic [1982] KLR* 219,** this Court stated the principle underpinning **Section 361** of the ***Criminal Procedure Code*** as follows:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did".***

This was also restated by this court in its recent decision in ***Dzombo Mataza Vs. R, 2014 eKLR*** where the court stated:-

> ***"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court – see Okeno v Republic (1972) E.A. 32. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code, our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong".***

14) We are of the view that only three issues turn for our consideration in this appeal. First is the issue of the age of the appellant, secondly is the issue of the absence of *voir dire* examination of the child by the trial court and lastly is whether the High Court duly performed its duty as required of a first appellate court.

15) As we have noted above, the appellant while responding to the submissions by the respondent contended that his age was not established during the trial of the case. Having perused the record we note that the issue of age of the appellant was not raised either before the trial Court or on appeal to the High Court. The appellant therefore sought to introduce the issue of his age for the first time before us. This Court sitting at Kisumu in ***Criminal Appeal No. 203 of 2009***, when faced with similar circumstances as those now before us stated as follows:-

> ***"….the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should***

have."

In ***Peter Kihia Mwaniki -vs- Republic- Criminal Appeal No. 280 of 2005,*** this Court while sitting as a second appellate court held as follows while dealing with ***Section*** 72(3) of the former ***Constitution*** which provided for the time within which an arrested person had to be arraigned in court (this issue was introduced for the first time on the second appeal):-

> ***"Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would possibly call evidence on the matter. The 14 days duration under section 72(3)(b) is not absolute. Circumstances may exist which militate against presenting a suspect before court within that period. The framers of the Constitution must have had that in mind when they provided that the duty of explaining the delay lay with the person who alleges there was no delay in bringing the accused to court. By raising the issue at this late stage the appellant has, in a way denied the prosecution the constitutional opportunity to explain that delay".***

16) Similarly, the appellant never raised the issue of his age in the trial Court or in the High Court. We, therefore, decline to deal with this issue and make a finding that the appellant should have raised the issue of his age in the two courts below where an inquiry could have been made regarding the issue. In any event, we have noted that from the charge sheet the appellant's apparent age was stated as 21 years. This ground of appeal therefore must fail.

17) On the second issue, the appellant contended that failure by the trial court to conduct a *voir dire* examination of PW1 was fatal to the prosecution case. A *voir dire* examination is essentially a pre-testimony procedure administered before taking the evidence of a child of tender years. It is only after this examination that the court can decide whether the child can give evidence. It is also after this interview that the court can decide whether the child understands the meaning of an oath and thus should be sworn or merely appreciates the importance of telling the truth and should therefore adduce unsworn testimony.

In the case of ***Johnson Muiruri V. Republic [1983] KLR 447,*** this court gave guidance on how to conduct a *voir dire* examination as follows:-

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses".***

And in ***Peter Kariga Kiune,*** *Criminal Appeal No 77 of 1982 (unreported)* we said***:***

> ***'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 event his sworn evidence may be received. If the court is not so satisfied his unsworn 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 (section 19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80).'***
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> ***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, and not be forced to make assumptions".***

18) The question that begs an answer therefore is 'what is the effect of the failure by the trial court to conduct a *voir dire* examination of PW1. In seeking an answer we find guidance in the case of ***Maripett Loonkomok v Republic [2016] eKLR,*** this court stated as follows:-

"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 reiterated what has been said many times before that that 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".

The court went on to state as follows:-

"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.'

See Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015.

On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct* voir dire *examination. The complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration".

19) We wholly agree with the above decision and hold that the failure by the trial court to conduct a *voir dire* examination did not render the prosecution's case fatal. Looking at the evidence before the trial court, we find that there was ample sufficient and independent evidence to support the charge. Just like in the case of ***Maripett Loonkomok (supra)***, penetration was similarly confirmed by medical evidence of PW3. Further the evidence of PW2, who was the complainant's mother also sufficiently, supported the charge. PW2 testified as follows:-

"I went where she was and found she was naked and was bleeding from her private parts. My daughter told me she had been defiled by one called Ndachu. I knew who Ndachu was".

The trial court also formed the opinion that PW1 was a credible witness. The court stated:

"She was consistent, candid and truthful."

Based on this evidence and finding, this ground of appeal must fail and is accordingly dismissed.

20) The appellant also challenged the decision of the High Court on the ground that the High Court failed to perform its duties as a first appellate court. The duty of a court sitting on a first appeal have time and again been stated as "***to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence"***. See ***Okeno v Republic [1972] EA 32.*** From our own consideration of the record and the judgment of the High Court, we cannot find anything to suggest that the High Court failed in its duty as stated above. It is succinctly clear that the learned Judge fully and carefully considered all the evidence before upholding the trial court's decision. From the judgment it is evident that the learned Judge understood his duty as the first appellate court. In this regard the learned Judge stated as follows:-

"This court has re-evaluated the evidence adduced before the trial court. It has also considered the submission by the appellant and the State. There are three elements that the prosecution was required to establish in order to secure conviction of the appellant on the charge of defilement."

21) The learned Judge identified the three elements as penetration; identity of the perpetrator; and lastly, the age of the complainant. The learned Judge then went ahead and re-analysed and re-evaluated the

evidence adduced before the trial court on the three elements and came to the conclusion that the prosecution had proved its case beyond reasonable doubt. The learned Judge remarked thus:-

> ***"This court, upon the re -evaluation of the evidence adduced before the trial court and the grounds of appeal put forward by the appellant, is of the opinion that the prosecution proved its case on the charge of defilement to the required standard of proof beyond any reasonable doubt".***

22) We consider that the reasons we have stated are more than adequate to decline the appellant's invitation to us to interfere with the concurrent findings by the trial Court and the High Court. Accordingly, we order that this appeal be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 28th day of July, 2017

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU, KAIRU FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.