



**Gudo v Republic (Criminal Appeal E037 of 2021)
[2022] KEHC 10760 (KLR) (27 June 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E037 OF 2021
GV ODUNGA, J
JUNE 27, 2022**

BETWEEN

ERIC OMONDI GUDO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable H Onkwani - PM dated 21st May, 2020 in Mavoko Chief Magistrate's Court SO Criminal Case No. 18 of 2020)

JUDGMENT

1. The appellant, Eric Omondi Gudo, was charged in the Mavoko Chief Magistrate's Court SO Criminal Case No. 18 of 2020 with the offence of Defilement Contrary to section 8(1) and (2) of the [Sexual Offences Act](#), No. 3 of 2006. The particulars were that the appellant, on diverse dates between the 1st day of March, 2020 and the April 18, 2020, at [particulars withheld], in Athi River Subcounty, within Machakos County, the Appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of one DAO, a child aged 11 years.
2. He, in the alternative, faced a charge of Committing an Indecent Act with a child contrary to section 11(1), the facts being that on the said date at the same place, he intentionally and unlawfully touched the vagina of DAO, a child aged 11 years.
3. In support of its case the prosecution called 6 witnesses.
4. After voir dire examination, the complainant gave evidence on oath. It was her evidence that some times in the month of March, 2020, her mother left her and her two siblings, in the custody of their father, the appellant, and went to the village. Though the children used to sleep on the floor while the parents would sleep on the bed, the appellant told the complainant to sleep on the bed with him and the Complainant did so. While sleeping, the appellant removed both his clothes and those of the Complainant and told the Complainant to keep quiet. Though the lights had been switched off, she



- could feel the appellant removing his clothes. After undressing both himself and the complainant, the appellant then inserted his penis into her vagina and though the complainant felt pain, as she had been warned to keep quiet by the appellant she cried but in very low tone. It was her evidence that though the following morning she was feeling pain on urinating, she did not see any blood and did not disclose the incident to her siblings since she had been warned by the appellant not to do so. Though
5. Upon the return of the complainant's mother after four days, the complainant did not disclose the incident to her. However, on a Saturday at around 7 am, while the mother was washing clothes outside and her siblings were playing outside while the complainant was in the house, with the appellant, the appellant left the seat where he was sitting, went to the window, peeped through and then locked the door using a nail. He then proceeded to the mattress where the complainant as sleeping, lifted her skirt and removed her underwear, then inserted his penis into her vagina. It was her evidence that the appellant was wearing a short and a vest. Thereafter, the appellant took a basin and a towel and went to take a shower.
 6. That night the complainant urinated in a basin and in the morning when her mother asked who had urinated in the basin, she disclosed that it was her since there was blood in the basin. She however informed the mother that she had a bleeding nose. Upon insistence by the mother, she owned up and disclosed that she had been defiled by daddy, the appellant. Her mother then confided in a friend who called the police. The appellant was then picked from the church where he was while the complainant was taken for treatment at Nairobi Women's Hospital.
 7. In cross-examination, the complainant stated that her clothes were blood stained.
 8. PW2, Winnie Musembi, a clinical officer at Athi River Health Centre was called to produce the complainant age assessment report for the Complainant which revealed that the Complainant was 11 years old.
 9. PW3, CAO, woke up on April 19, 2020 at around 7am and found that the basis which the children were using for urination at night had blood stained urine. Upon interrogation, the Complainant, who had not started menstruating, disclosed to her that she had been defiled by her father, the Appellant and proceeded to narrate to her who the incident occurred. When the Appellant returned she asked him and disclosed the incident to her friend after which they reported the matter and took the Complainant to Nairobi Women's Hospital where she was treated and she identified the treatment notes, the laboratory tests, P3 Form and PRC Form.
 10. It was her evidence that the Appellant was not the biological father of the Complainant and that she got the Complainant by the time of her marriage to the Appellant. PW3 stated that though previously she had travelled upcountry, the Complainant did not narrate to her what transpired.
 11. It was her evidence that though the incident occurred on 18th she discovered it on 19th. It was her evidence that the skirt had no blood and that the Complainant had cleaned her underwear. She testified that she had no suspicion because the Appellant loved the Complainant.
 12. PW4, Naomi Muniyiva, who was working at the Children's office, Athi River, interrogated the Complainant who disclosed to her that she had been defiled by her father when her mother was away. According to the narration the Appellant defiled the Complainant when her mother was away and would warn her not to disclose the fact to anyone. According to the information from the Complainant, the Appellant defiled her for the three days that the mother was away. It was her evidence that the incident traumatised the Complainant who avoided playing with the other children and was scared of her father. It was her view that the Complainant needed counselling. She exhibited her report to that effect.



13. PW5, Dr. Njuguna, a doctor thatched to Nairobi Women's Hospital testified that the Complainant was examined on 19th April, 2020 by his colleague upon allegations that she had been defiled by her father. Upon examination, the HIV test was negative as well as the test for the other tests. However, the High Vaginal Swab revealed cells but no spermatozoa. The Complainant however complained of pain while passing urine with blood spots. Upon interrogation the Complainant disclosed that she had been defiled by her father who inserted his penis into her vagina.
14. Upon examination, there was no physical injury and her outer genitals were normal though there was pain in her labia majora which also had bruises with red spots. There were small bloody stains suggestive of injury by blunt object. The witness produced the PRC Form, p3 Form and treatment forms including the lab test results and the children's report.
15. PW6, Cpl. Caroline Seet, attached to Athi River gender desk received a report of defilement vide a phone call from a member of the committee policing on 19th April, 2020 at 10.30 am. According to the report the Complainant had been defiled by her father who was planning to escape. The witness advised the reportee to arrest him and take him to the station and at noon the suspect was taken tot the Station. Upon interviewing the Complainant, the suspect and the mother, the Complainant disclosed that she had been defiled by her father, the Appellant. The witness advised the mother to take the Complainant for treatment and issued her with a P3 Form after recording their statements. It was her evidence that the Complainant was 11 years. She then preferred the charges against the appellant.
16. The witness however disclosed that at some point, the appellant had made a report at the station that he had a disagreement with his wife due to infidelity but the report was not recorded because no offence was disclosed.
17. The witness stated that it was not possible to arraign the appellant in court within 24 hours because the appellant was arrested on a Sunday and it was during COVID period.
18. At the close of the prosecution's case, the Appellant was placed on his defence and the record indicates that he was explained to the three ways of defending himself and he wished to remain silent.
19. In her judgement, the learned trial magistrate found that the charge of defilement was proved beyond reasonable doubt. He was convicted accordingly. However, in his mitigation, the appellant stated that he was implicated in the offence and that on the day of his defence case, he was confused hence the reason he did not defend himself.
20. He was then sentenced to 35 years in prison.
21. In this appeal, the appellant set out the following grounds:
 1. That, the trial magistrate erred in law and fact by failing to find that the element of the offence (penetration) was not conclusively proved to warrant a conviction.
 2. That, the learned trial magistrate erred in law and fact in relying on the evidence of PW1 whose integrity was questionable.
 3. That, the learned trial magistrate erred in law and fact in failing to find that the charge against the appellant was bad for duplicity.
 4. That, the trial magistrate erred in law and fact by failing to find that the voire dire was badly conducted in the present case in violation of the law.
22. Based on *Fappyton Mutuku Ngui vs Republic* Cr. Appeal 296 of 2010 and *Charles Wamukoya v Republic*, Cr. Appeal No. 72 of 2013, it was contended that the prosecution failed to prove their case



beyond reasonable doubt as required by law. According to the Appellant, the prosecution did not prove that there was penetration of the genital organ of PW1. It was submitted that the two medical documents contradicted each other as regards the injuries sustained.

23. It was further submitted that from the evidence of PW3, the Complainant's evidence could not be believed. The appellant therefore faulted the trial magistrate's decision in that she believed the complainant who could not be believed by the family which she lived with on daily basis. He relied on the case of *Omari Ismael Mazzha vs. Republic* (2017) eKLR.
24. It was submitted that without explicit evidence of presence of semen or seminal fluid or supportive corroborative evidence, it is not safe to arrive at an abstract inference of sexual abuse and reliance was placed on P. K. W v. R. and it was submitted that penetration on PW1 was not conclusively proved in this case to warrant a conviction.
25. It was submitted PW1 demonstrated openly before the court and through evidence tendered by other prosecution witnesses that she was not a credible witness worth of believe.
26. According to the Appellant, the voire dire conducted on the minor was not well conducted since PW1 was only asked elementary questions. She was not asked whether she knew the reason of saying the truth and whether she knew the meaning of an oath. This was so important based on the fact that more than one witness had described her to be a liar. In this regard the Appellant relied on the case of *Joseph Opando vs. Republic*, Cr. App. No. 91 of 1999, where the Court of Appeal outlined the stages to be followed in determining whether or not a child of tender years may give sworn evidence as follows:-

“There are two stages which must be followed and must appear on the record of the trial court. First, the examination must endeavor to ascertain whether the witness understands the meaning, nature and purpose of the oath. The question or questions by the court must be directed to that. If the court from the answer it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of the oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not come into play. Where however the witness does not understand the meaning and the purpose of the oath, stage two of the examination then follows. The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify the reception of his or her evidence though not on oath. This examination must equally appear on record. Simple elementary questions would normally be asked like date, the day, the school the witness is attending and other matters. If the court is satisfied from the answer to such questions that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence.”

27. In the Appellant's submissions, the questions asked by the court and from what was recorded the two stages above were not covered which omission raises questions as to whether the evidence of PW1 was well received. PW1 voire dire was conducted under the second stage and she ought not to have been sworn.
28. It was further submitted that the appellant was not personally examined to ascertain whether he had committed the alleged offence; that the age assessment of the complainant done was not proved well;
29. The Appellant concluded his submissions by urging the court to re-evaluate the evidence afresh based on the case of *Gabriel Kamau Njoroge v R* [1982-88] KAR, *Ouma v R*, Criminal Appeal No, 91 of 1985 and *Salim Juma Dimiro v R*, Criminal Appeal No.114 of 2004 and to find that the Prosecution failed to prove its case beyond reasonable doubt.



30. In opposing the appeal, the Respondent submitted that PW1 in her testimony stated that she was eleven (11) years of age. Further, the prosecution through PW5 produced age assessment of the complainant as evidence (prosecution exhibit 1). According to the age assessment, the complainant was assessed to be 11yrs old. The appellant did not challenge the age assessment produced by the prosecution.
31. Regarding proof of penetration, the respondent submitted that based on the testimony of PW1 her mother, PW3 and PW5, Dr Njuguna, it was proved that there was penetration. As to whether the same was occasioned by the appellant, it was submitted that PW1 testified that the appellant was a person known to her as her father (not biological) and they used to stay together with him and her mother. The complainant knew the appellant very well and therefore this could not be a case of mistaken identity. In his cross-examination, the Appellant did not deny that the complainant was his child, and acknowledged that they lived together.
32. While it was appreciated that the only evidence that points to appellant is that of the minor, the Respondent relied on the case of *Mohamed v Republic* [2006] 2 KLR 138 and submitted that the prosecution proved its case beyond reasonable doubt.
33. As regards *voire dire* examination, it was submitted that the complainant in this case was aged 11 years old at the time the offence was committed against her. While appreciating that section 19(1) of the *Oaths and Statutory Declarations Act* and section 125(1) of the *Evidence Act*, are silent on the definition of who is a child of tender years, it was submitted that the provisions of the law *voire dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus, under the *Evidence Act*, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.
34. As for the question, who a child of tender years is, the respondent relied on section 2 of the *Children's Act* which defines a child of tender years to mean "a child under the age of 10 years". However, court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to *voire dire* examination. Reliance was therefore placed on the case of *Kibangeny Arap Korir v Republic*, [1959] EA 92 where the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.
35. In this case, it was submitted that the particulars supporting the charge were that the complainant was 11 years old at the time the offence was committed. The same age was reflected in the P3 form (exhibit 1) and the age assessment (exhibit). The respondent cited *Maripett Loonkomok v Republic* [2016] eKLR where the Court of Appeal sitting at Nyeri stated that:
- "It is firmly settled that not in all cases that *voire dire* is not administered or is not administered properly the entire trial would be violated."
36. The respondent also cited *Patrick Kathurima v Republic* Nyeri CRA 137 of 2014 where the Court of appeal after reviewing case law on the subject of *voire dire* observed thus:-
- "It is best though not mandatory in our context 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 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.”

37. It was submitted that the minor was aged 11 years old when she testified and Voire dire was conducted by the learned magistrate. Accordingly, the Respondent’s position was that this ground of appeal fails.
38. In conclusion, it was submitted that the prosecution proved all the ingredients of the offence beyond any reasonable doubt; that the conviction was safe; and that this appeal does not raise any basis to disturb the conviction. It was sought that the conviction be upheld and sentence confirmed.
39. The Appellant in his rejoinder to the said submissions maintained his position that the prosecution failed to prove its case and that the appeal ought to be allowed.

Determination

40. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.
41. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

“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 v 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. Ruwal v 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.”

42. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

43. It was therefore appreciated by the Court of Appeal in *Kilu & another vs. Republic* [2005]1 KLR 174, that:



1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
 2. 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 findings and 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.
44. The Appellant herein was charged under section 8(1) and (2) of the [Sexual Offences Act](#). No. 3 of 2006. Section 8 of the [Sexual Offences Act](#) provides as follows:
8.
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
 - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
 - (5) It is a defence to a charge under this section if -
 - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - (b) the accused reasonably believed that the child was over the age of eighteen years.
 - (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.
 - (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the [Borstal Institutions Act](#) and the Children's Act.
 - (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.
45. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the appellant. See



the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013, where it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

46. In the case of *Kaingu Elias Kasomo vs. Republic* Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

“Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

47. The importance of proving the age of the complainant in sexual offences was emphasized in *Alfayo Gombe Okello vs. Republic* (2010) eKLR where the court stated that:

“In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars.”

48. In *Dominic Kibet vs. Republic* Criminal Appeal No. 155 of 2011 it was held that:

“...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof.”

49. In this case, both oral and documentary evidence was that the complainant was 11 years old. In fact, this evidence was not challenged by the appellant at all. In the case of *Francis Omuroni vs. Uganda*, Court of Appeal in Criminal Appeal No. 2 of 2000, it was observed as follows:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

50. In *Chipala vs. Rep.* [1993] 16 (2) MLR 498 the Malawian High Court held at 499 that:

“It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person.”



51. As regards penetration, section 2 of the *Sexual Offences Act* defines “penetration” as:
- the partial or complete insertion of the genital organs of a person into the genital organs of another person.
52. Therefore, for the offence of defilement to be proved evidence must show that the appellant inserted his penis into the vagina of the complainant. It is not sufficient that the said organs came into contact. However partial insertion suffices for the purposes of penetration as the said insertion need not be complete.
53. In this case, the complainant testified, as regards the first incident that she was asleep when the appellant inserted his male genital organ into hers. It was also her evidence that the lights were off and it was through the movements of the appellant that she realised that the appellant was removing her clothes. In my view, in these circumstances one cannot state with certainty that the penetration was by the appellant’s genital organ. Since every ingredient of the offence must be proved beyond reasonable doubt, I find that there was doubt as to whether penetration for the purposes of defilement was proved in this first incident.
54. As regards the second incident, the complainant’s evidence was that it took place during the day. However, the medical examination that was undertaken the following day revealed that there were no spermatozoa, and that while the Complainant experienced pain while passing urine and there were blood spots while she was passing urine, there were no physical injuries noted though the complainant experienced pain in her labia majora and there were bruises on her labia majora with red spots. The complainant however, had no discharge except for small bloody stains suggesting injury by a blunt object. From the above evidence, one must ask whether the prosecution proved that the penetration of the complainant’s genital organ was by the Appellant’s male genital organ or any other organ.
55. I appreciate the holding in *George Owiti Raya v Republic* [2013] eKLR where it was noted that:-
- “There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant’s hymen was found to be intact, suffice it that there was evidence of partial penetration.”
56. In this case, however, a much incisive examination ought to have been done in order for the evidence to rule out the possibility of any other organ save for the Appellant’s male genital organ. Based on the facts of this case, while I find that injuries were caused to the complainant’s genital organs, I find that it was not proved beyond reasonable doubt that the appellant’s male genital organ. However, considering the relationship between the complainant and the appellant, I have no doubt at all in my mind that the person who caused the said injuries was the Appellant as there could not have been any mistaken identity. The appellant in this appeal has alluded to existence of bad blood between him and PW3. However, when given an opportunity to defend himself, the Appellant declined to do so. He cannot, raise such a defence at this stage of the proceedings.
57. In this appeal, the appellant took issue with the manner in which voire dire examination was conducted. He submitted that the conditions for deciding to take the Complainant’s evidence on oath



were not fulfilled. In *Macharia vs. Republic* [1976] KLR 209, it was held by Kneller & Platt, JJ (as they were) that:

“It [voir dire] must be a preliminary examination of a witness by the magistrate in which the witness is required “to speak the truth” with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth). A finding on these points after the person of tender years has testified will not do. The irregularity is not fatal. These girls were aged thirteen and twelve years, attending a primary school and in standard VII. Their answers to questions were coherent and revealed that they were intelligent. They were competent.”

58. It was however appreciated in Court of Appeal decision in *Maripett Loonkomok vs. Republic* [2016] eKLR that:

“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 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. Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. Voir dire, a latin phrase (verum dicere) for saying “what is true”, “what is objectively accurate or honest” has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as “a trial within a trial”, 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. But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; “.. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence” (our emphasis)

Although this decision, through section 19 of *Oaths and Statutory Declarations Act* underpinned legal practice in relation to children’s testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the



trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See *Johnson Muiruri v R (1983) KLR 447*. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006.”

59. In this case considering the evidence in its totality, I am not satisfied that the proceedings were vitiated by the brief finding made by the learned trial magistrate.

60. Having so found, I have no reason to doubt that injuries were caused to the complainant's genitalia. What is in doubt is, however, the instrument that caused the same.

61. Section 5(1)(a) (1) and (2) of the *Sexual Offences Act* provides as follows:

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

62. This provision was the subject of the determination in *John Irungu vs Republic (2016) eKLR* where the Court of Appeal expressed itself as hereunder:

“Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”

63. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. From the evidence adduced it is my view that the evidence could only disclose the commission of the offence of sexual assault contrary to section 5(1) (a)(1) of the *Sexual Offences Act*. Though that was not the main offence with which the appellant was charged, in my view, it is a cognate offence to the offence of defilement. Section 179 of the Criminal Procedure Code provides that:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and



the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

64. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in *Robert Mutungi Muumbi v. Republic* [2015] eKLR expressed itself as hereunder:

“The third issue in this appeal relates to appellant’s alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda’s response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged...As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *Robert Ndecho & Another v. Rex* (1950-51) EA 171 and *Wachira S/o Njenga v. Regina* (1954) Ea 398). Spry, J. Explained The Essence of The First Consideration As Follows In *Ali Mohammed Hassani Mpanda v. Republic* [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya [*Criminal Procedure Code*](#):

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.” [Underlining mine].

65. The court proceeded:

“The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving



into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See Republic V. Cheya & Another [1973] EA 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.”

66. Accordingly, since the Appellant is entitled to the benefit of the lesser offence, I hereby set aside the appellant’s conviction of the offence of defilement and substitute therefor the conviction of the offence of sexual assault contrary to section 5(1)(a)(1) as read with section 5(2) of the *Sexual Offences Act*. Consequently, I quash the sentence meted against the Appellant and substitute therefor a period of 16 years in prison. The said period will run from 19th April, 2020 when the Appellant was arrested.

67. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED AT MACHAKOS THIS 27TH DAY OF JUNE, 2022.

G. V. ODUNGA

JUDGE

In the presence of:

The Appellant

Mr Jamsumba for the Respondent

CA Susan

