**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO. 235 OF 2016**

**EDWIN WABOMBA KARANI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(*Being an appeal from the original conviction and sentence in criminal case number 649 of 2015 in the Senior Principal Magistrate's Court at Webuye – C. N. Oruo (RM) on 18/11/2016*)**

**JUDGMENT**

**1.** The Appellant **Edwin Wabomba Karani** was charged with the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the 7th day of July 2015 in Bungoma East District within Bungoma county, he intentionally and unlawfully caused his penis to penetrate the anus of RW a child aged 13 years.

**2.** He equally faced an alternative charge of committing indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. Particulars of the alternative charge were that on 7th July 2015 in Bungoma East District within Bungoma, County he intentionally and unlawfully touched the anus of RW a child aged 13 years.

**3.** A synopsis of the evidence before the trial court was that the Complainant, who was a 13 year old epileptic boy, went to a neighbor's house to get sisal fibers to make ropes. The Appellant who was known to him got hold of him and carried him into the sugarcane plantation where he sexually assaulted him. When the Appellant let him go he went home and reported to his mother who made the report to the police and also took the Complainant to the hospital. A P3 form was filled on his behalf and the Appellant was subsequently arrested and charged as set out above.

**4.** The Appellant denied the offence but at the end of the trial, the court found him guilty on the main charge and sentenced him to 20 years imprisonment. Being dissatisfied with the decision of the trial court, the Appellant preferred this appeal on grounds that: the magistrate convicted him on contradictory evidence and hearsay testimonies and that the charge sheet was defective.

**5.** The Appellant filed written submissions in support of his appeal in which he complained that he was not furnished with witness statements and as such he was not accorded a fair trial and that being unrepresented, he was ill equipped to understand the entire trial process. He prayed for a retrial before a different magistrate.

**6.** The state through prosecution counsel Mrs. Njeru opposed the appeal. Counsel submitted that the record is very clear that the Appellant asked to be supplied with witness statements and the court made the requisite order. Although the state counsel could not tell whether the statements were eventually furnished to the Appellant, she observed that the Appellant participated in the entire trial process and even cross examined the prosecution witnesses. Further that the proceedings were conducted in Kiswahili, a language he understood.

**7.** With regard to hearsay evidence, state counsel Mrs. Njeru submitted that the Complainant did not testify because the mother applied to testify as an intermediary due to the Complainant's epileptic condition. With regard to overstaying in prison before being produced in court, the state counsel asserted that the Appellant could have raised this issue in the first instance before the trial court. Counsel contended that the Complainant and the Appellant were known to each other and that the Complainant gave a clear account of how the Appellant sodomized him and attempted to give him money which the Complainant rejected. That the medical evidence also proved that the complainant was sodomized.

**8.** This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. This court held in the case of **Okeno vs. Republic [1972] EA** while the Court of Appeal held in the case of **Mark Oiruri Mose vs. Republic [2013] eKLR** that the court of first appeal is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter. In doing so, the court must always bear in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance therefor.

**9.** In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child were proved as required in law; beyond any reasonable doubt. The key ingredients of the offence of defilement are proof of the age of the Complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence.

**10.** Fair trial is one of the key tenets of justice. It is a right recognized under **Article 50** of the **Constitution**. The Constitution demands that if one is arrested he has to be accorded justice without delay. A look at the charge sheet shows that the appellant was arrested on 9 th July 2015 and brought before the court on 10th July, 2015 well within the 24 hours as provided for in law. From the record, the Appellant did not revisit the request for the statements after the court ordered for him to be furnished with the statements. He went on to fully participate in the trial and cross-examined the prosecution witnesses.

**11.** With regard to age, it was the evidence of PW1, which was corroborated by **PW3** the clinical officer that the Complainant was aged 13 years at the time the offence was committed. The certificate of dedication from the Pentecostal evangelism Team of Africa indicates that the complainant was born on 20th March 2001. It is stamped and signed. The medical evidence shows that the estimated age of the Complainant is 13 years. The offence was committed on 7th July 2015 which would mean that at the time the incident occurred, the Complainant was aged 14 years although the learned trial magistrate indicated in his judgment that the Complainant was aged 15 years. The variances in age notwithstanding, what is clear is that the Complainant was a minor at the time the offence was committed.

**12.** With regard to penetration **PW1** applied and was allowed to testify as an intermediary on behalf of the Complainant who is epileptic. She testified that the Complainant told her that the Appellant had forcefully removed his shorts and inserted his penis into the Complainant's anus. When **PW1** examined the Complainant she saw a whitish discharge that looked like spermatozoa coming out of the anus. **PW3** the clinical officer produced the medical report prepared by his colleague. The medical report indicated that the Complainant's anus was bruised and there was a whitish discharge on the anal region. **PW4**, the clinical officer who examined the Complainant stated that the medical record indicated that the Complainant was sodomized. It is therefore not in doubt that penetration was conclusively proved.

**13.** With regard to the identity of the perpetrator, the Appellant alleged that the trial magistrate relied on hearsay evidence to arrive at his decision. State Counsel Mrs. Njeru submitted that the prosecution made an application on behalf of the Complainant to have his mother PW1, testify as an intermediary since the Complainant was epileptic. **Section 2** of the **Sexual offences Act** defines an intermediary to mean:

> **"…..a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."**

**14. Section 31 (2) of the Sexual Offences Act further** provides that:-

> **"The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, <u>other than the accused</u>, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of –**
>
> **(a) age;**
>
> **(b) intellectual, psychological or physical impairment;**
>
> **(c) trauma;**
>
> **(d) cultural differences;**
>
> **(e) the possibility of intimidation;**
>
> **(f) race;**
>
> **(g) religion;**
>
> **(h) language;**
>
> **(i) the relationship of the witness to any party to the proceedings;**
>
> **(j) the nature of the subject matter of the evidence; or**
>
> **(k) any other factor the court considers relevant."**

**15.** The provision of the services of an intermediary in a criminal trial today constitutes a right to a fair trial guaranteed under **Article 50 (7)** of the **Constitution**. It provides thus:

> **"In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."**

**16.** The evidence on record, is clear that **PW1** told the trial court that the Complainant was epileptic and therefore qualified as a vulnerable witness who could not testify on his own. The evidence of PW1 in her capacity as an intermediary cannot therefore be termed as hearsay evidence.

**17. PW1**, the Complainant's mother, testifying as an intermediary stated that it was the Appellant who defiled the Complainant. That on the material date at around 11 a.m. the Complainant came home crying describing what the Appellant had done to him. The Appellant was a person known to the Complainant who referred to him by name stating that Edwin had sodomized him. This was therefore a case of recognition as opposed to identification of the perpetrator. In the case of ***R -vs- Turnbull & Others [1976] 3 All ER 549*** the learned Judges stated on page 552 as follows:

> ***"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

**18.** In his defence, the Appellant denied committing the offence and stated that he was on his way home from work and as he approached a *chang'aa* den, he came upon two people who were fleeing from the police that were arresting people. The police arrested him and subsequently charged him with this offence. This defence was analyzed by the trial court which found it to be unbelievable and consequently dismissed it. I am in agreement with the learned trial magistrate on this.

**19.** With regard to a re-trial, the principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** opined thus:

> **"...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 insufficient evidence or for the purposes 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;..."**

**20.** After a careful analysis of the evidence on record, I find that there is nothing in the record to demonstrate that the trial was not fair or was defective to warrant the grant of an order for a retrial. The evidence adduced by the prosecution before the trial court satisfied all the ingredients required to sustain a charge of defilement, and the trial was conducted in a manner that complied with the requirements of **Article 50** of the **Constitution**.

**21.** In the end, I find that the Appellant was properly identified as the person who defiled the Complainant herein. I also find that the trial court acted properly in dismissing the Appellant's defence since it was not tenable in light of the evidence on record. The conviction was therefore founded on sound evidence.

**22.** For the foregoing reasons, I find that the offence of defilement was proved against the Appellant to the required standard. This appeal therefore fails and is accordingly dismissed.

**DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.**

**.....**

**L. A. ACHODE**

**HIGH COURT JUDGE**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 22ND DAY OF NOVEMBER 2018.**

**.....**

**S. N. RIECHI**

**HIGH COURT JUDGE**