REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 83 OF 2016

WYCLIFF THOMAS MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence by Hon.D. Orimba SPM on 17th November 2016 in Criminal Case (SO) No. 19 of 2016 in the Senior Principal Magistrate's Court at Kangundo)

JUDGMENT

The Appellant was sentenced to serve twenty (20) years imprisonment after being convicted of the offence of defilement of a child, contrary to section 8(1) (3) of the Sexual Offences Act. The particulars of the offence were that on 11th September 2016 in Matungulu District within Machakos County, the Appellant intentionally caused his penis to penetrate the vagina of F M, a child aged 14 years. The Appellant was also charged with the alternative offence of committing an indecent act with a juvenile contrary to section 11(1) of the Sexual Offences Act No 3 of 2016.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Amended Grounds of Appeal and submissions dated 26th July 2017 that he availed to this Court.

In summary, the Appellant alleges that the trial magistrate erred in law and facts by conducting a *voire dire* examination of PW1 who was the complainant who was not a child of tender years, hence contravening the Oaths and Statutory Declarations Act; by entering a guilty plea whereas his mitigation statement qualified the unequivocal plea; and by failing to appreciate that the evidence failed to identify he Appellant

Ms. Rono, the learned prosecution counsel, made oral submissions in opposition to the appeal during the hearing held on 26th July 2017, wherein she submitted that it is not fatal for a court to conduct a *voire dire* examination on a child who is above ten years old. She however conceded the appeal on the ground that the plea was not unequivocal. Reliance was placed on the decision in **Muiruri vs Republic (2003) e KLR** for the request for a retrial on the ground that the offence involved a child of tender years.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have perused the record of the trial Court and note that after two witnesses testified, being the complainant (PW1) and her mother (PW2), the Appellant indicated he wanted to change his plea. The proceedings continued as follows:

> **"Court: Charge read over and explained to the Accused in Kiswahili and he replies:**
>
> **Accused: It is true**
>
> **Prosecutor: I wish to rely on the evidence adduced by PW1 complainant. In addition I wish to produce the medical treatment card, clinic card, a letter from Mama Lucy Hospital confirming treating the complainant, post rape care form dated 12/9/16 as exhibit 1-4 respectively.**
>
> **Court: Plea of Guilty entered and convicted on his own plea of guilty."**

The procedure to be applied in taking a plea of guilty was explained in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."***

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code which provides as follows:

> **(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**
>
> **(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**
>
> **Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**
>
> **(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.**
>
> **(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.**

Coming to the present appeal, the record of the trial Court shows that the prosecution did not outline the facts upon which the charge was founded after a plea of guilty was entered by the trial Court.

Consequently, the facts giving rise to the offence the Appellant pleaded to, which were required to show that the essential ingredients of the offence of defilement which is penetration and the age of the complainant, were not given by the prosecution, and explained to the Appellant in a language and manner that he understood for him to have an opportunity to admit or challenge the same. In addition, the Appellant was not given the opportunity to challenge or admit to any facts. I therefore find that the Appellant's plea of guilty was not unequivocal to this extent, and the sentence imposed upon him was also unlawful in the circumstances.

Ms. Rono asked for a retrial. I have in this regard noted the evidence of the complainant (PW1) in which she refers to a Kevin who she claims to have had sex with on the date she was allegedly defiled by Appellant, and that she had pleaded with the Appellant to marry her. The medical evidence produced can only be corroboration of penetration of PW1, but will not be able to establish the person the complainant had sex with, and the evidence that it was the Appellant who defiled the complainant will therefore need further corroboration. To this extent, a retrial might serve the purpose of filling up the gaps in the prosecution's case. I am in this respect guided by the decision of the East Africa Court of Appeal in **Fatehali Manji v Republic [1966] EA 343** where it was held as follows:

> **"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 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; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.**"

I accordingly quash the conviction of the Appellant for the charge of defilement contrary to section 8(1) and (3) of the Sexual Offences Act, and set aside the sentence imposed upon the Appellant of a term of imprisonment of twenty years for the conviction. I also set the Appellant at liberty forthwith unless he is otherwise lawfully held

It is so ordered.

DATED AT MACHAKOS THIS 4TH DAY OF AUGUST 2017.

P. NYAMWEYA

JUDGE