REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 164 OF 2013

CHARLES OWANGA ……..……...……..….....APPELLANT

VERSUS

REPUBLIC…….. STATE

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. F. Kombo– Senior Principal Magistrate delivered on the 23rd July, 2013 in CMCR Case No.* 137 of 2009*)

JUDGMENT

The appellant **CHARLES OWANGA ALUOCH** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Nakuru Law Courts.

The appellant was originally arraigned in the trial court on 26/6/2009 facing a charge of **ATTEMPTED DEFILEMENT OF A CHILD CONTRARY TO SECTION 9(1) as read with SECTION 9(2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 15th day of June 2009 at [Particulars withheld] Primary School in Nakuru District of the Rift Valley Province, attempted to commit an act which could cause penetration with a child aged 12 years namely D M N by touching her private parts namely vagina"***

The appellant also faced an alternative charge of **INDECENT ACT WITH A CHILD CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT, 2006.**

The appellant pleaded **'Not Guilty'** to both charges and his trial commenced on 27/8/2009. This case has had a long and chequered history. The trial originally proceeded before **HON. C. A. OTIENO** Resident Magistrate who heard the evidence of eleven witnesses.

On 27/7/2010 the trial magistrate withdrew from the trial claiming that defence counsel had acted abusively towards her.

The matter was taken over by **Hon. H. Barasa** Resident Magistrate who gave directions that the trial would begin de novo. However thereafter the prosecution pleaded that they were unable to trace the witnesses who had previously given evidence in the matter. The file was then referred to the High Court for review of the orders for a de novo hearing.

In a ruling delivered on 7th October, 2011 **HON. JUSTICE ANYARA EMUKULE (Retired)** exercising the High Court powers of review donated by Section 364(1) (b) of the Criminal Procedure Code, reviewed the orders for a fresh hearing and gave directions that the matter would proceed from where the first trial magistrate had stopped.

The matter then proceeded before **HON. F. KOMBO** Senior Principal Magistrate who recorded the defence of the appellant. The prosecution called a total of eleven (11) witnesses in support of their case.

The appellant was at the material time the Deputy Head teacher of [Particulars withheld] Primary School and the complainant **D M** who was aged 12 years at the material time was a pupil in class 6 in the same school.

The complainant was taken through a ***'voire dire'*** examination after which the trial magistrate ruled that she give a sworn defence. The complainant told the court that on 15/6/2009 at about 12 noon the appellant called herself and two of her friends **G I** and **L W (PW2)** to go to his office to arrange books. The children went and did that task. When they were finished the appellant allowed **PW2** and **'G'** to leave but

instructed the complainant to remain behind.

The appellant then instructed the child to hold the desk and bend over. The child did as asked thinking that she was going to be caned. The appellant then stood behind her and unzipped his trouser and pulled out his penis. The complainant began to cry and left his office. The next day the appellant again called the three girls to his office. They hid in the toilet and did not go.

On 17/6/2009 the appellant again sent for the three girls. They went to his office but the appellant said that he only wanted to see the complainant. He sent the other girls away.

The complainant told the court that on this occasion the appellant clapped his hand over her mouth and pushed her onto the floor. He then tore off her panty and defiled her. When he had finished the child went to the toilet and cleaned herself up. She did not tell anyone what had happened.

Later the complainant began to experience pains in her stomach. She then told her desk-mate one **M K PW3** that the appellant had defiled her. The complainant also revealed the incident to her science teacher **MS E N PW5.**

The matter was then revealed to the Head Teacher who informed the child's father. The Head teacher also confronted the appellant who denied having defiled the child. The matter was eventually reported to police.

The complainant was taken to hospital for a medical examination and the appellant was arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant gave a sworn defence in which he denied having defiled the complainant. The appellant called two (2) witnesses in support of his defence.

On 23/7/2013 the learned trial magistrate delivered his judgment in which he convicted the appellant for the offence of Defilement and sentenced him to serve fifteen (15) years imprisonment. Being aggrieved the appellant filed this appeal challenging both his conviction and sentence.

The appellant who was not represented by counsel during the hearing of the appeal relied upon his written submissions which had been duly filed in court. **MR. CHIGITI** learned State counsel opposed the Appeal. The state did on 28/4/2017 file in court a Notice seeking enhancement of sentence. This notice was served on the appellant. The appellant informed the court that despite the intention of the state to seek an enhancement of sentence he would nevertheless pursue his appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate the entire prosecution case and to draw its own independent conclusions on that evidence. In the case of **AJODE Vs REPUBLIC 2004 2KLR** it was held as follows;

> ***"In law, it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that"***

Likewise in the case of **MWANGI Vs REPUBLIC [2004] 2 KLT 28** it was held

> ***"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 have the appellate court's own decision on the evidence.***
>
> ***2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.***
>
> ***3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions. 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 had the advantage of hearing and seeing the witness"***

Before I delve into the merit or otherwise of this appeal based on the facts of the case, I deem it necessary to first deal with one particular ground of the appeal raised by the appellant.

The appellant submitted that he was denied a right to a fair trial in that Section 200(3) of the Criminal Procedure Code was not complied with. The appellant argued that his demand for a de novo trial was not complied with.

As stated earlier this was a trial that was handled by several magistrates. The initial trial magistrate **Hon. C. A. Otieno** substantially heard the entire prosecution case. However on 27/7/2010, **Hon Otieno** disqualified herself from hearing the matter further due to some disagreement with counsel for the appellant. The appellant made submissions tending to suggest that the learned trial magistrate had no just cause to disqualify herself. That is not a matter for this court to decide upon. The trial magistrate had the discretion to decide whether or not to disqualify herself. Where she felt it was untenable for her to continue with the trial this court cannot fault her for taking that decision.

Once **Hon Otieno** disqualified herself directions were taken on 5/8/2010. **MR. BII** Advocate who was then acting for the appellant prayed to have the matter begin de novo. The second trial magistrate **Hon Barasa** acceded to this request and the case was listed to being afresh meaning that all the witnesses who had previously testified were to be recalled.

However **Hon. Barasa** did not proceed with the case as he was transferred and the matter landed before **Hon. Wendy Kagendo** Principal Magistrate. On 22/9/2011 the court prosecutor informed the court that the police were experiencing difficulty in securing the attendance of the witnesses as some witnesses had relocated and others were reluctant to come to testify a second time. The prosecutor indicated that if the matter was to proceed ***'de novo'*** then out of the eleven (11) witnesses who had testified only the attendance of one (the complainant) could be secured.

The Hon. Principal Magistrate rightly noted that she had no jurisdiction to review the orders made by her fellow magistrate that the trial commence afresh. She therefore referred the matter to the High Court in Nakuru for directions to be given.

Hon. Justice Anyara Emukule (retired) delivered his ruling on 7/10/2011 in which he reviewed the orders of **Hon. Barasa** requiring that the case begin ***'de novo'*** and instead directed that the trial proceed from where the first trial magistrate had stopped. For the record I am in agreement with the decision and ruling of Justice Emukule.

The ruling of 7/10/2011 did **not** amount to a denial of the appellant's rights to a fair trial. Section 364(1) (b) of the Criminal Procedure Code vests in the High Court powers to review, alter or reverse any order made by a magistrate's court. Thus the reversal of the order for a ***'de novo'*** trial was done procedurally in accordance with the law and was necessitated by the prevailing circumstances.

Section 200(3) of the Criminal Procedure Code provides for the procedure to be adopted when one magistrate succeeds another during the course of a trial.

A de novo trial is not a right. An accused may apply to have witnesses re-called but the discretion lies with the court as to whether to allow or disallow that application. In **NDEGWA Vs REPUBLIC [1985] KLR 534**, the Court of Appeal held as follows:-

> ***"1. The provisions of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor".***

Similarly in **JOSEPH KAMORA MARO Vs REPUBLIC 2014 eKLR,** the Court of Appeal held as follows:

> ***"The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of this right, he/she may elect to have the witness recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may have even died. To this extent we are in agreement with the learned Judges of the High Court that 'this provision does not oblige the succeeding magistrate to start de novo' but what is necessary is to inform an accused of his right under Section 200(3) of the Criminal Procedure Code".***

The appellant herein was mistaken in his belief that he had a right to have his trial commence *de novo*. As was demonstrated by the prosecution and accepted by Justice Emukule, the circumstances mitigated against recalling all the eleven (11) witnesses who had already testified. The proceedings in the appellant's trial were not flawed as he submits. He was informed of his right under Section 200(3). The failure to start the trial a fresh did not violate his rights to a fair trial and I dismiss this ground of the appeal.

In any case of Defilement (or indeed of Attempted Defilement) the following are the three crucial ingredients of the offence all of which must be proved beyond reasonable doubt

1. The age of the child
2. The fact of penetration
3. The identity of the assailant

The question of age of the victim in charges brought under Section 8(1) of the Sexual Offences Act is critical because the Act provides for mandatory minimum sentences to be imposed in the event of a conviction which are largely dependent on the age of the child.

In the case of **ALFAYO GOMBE OKELLO Vs REPUBLIC [2010]eKLR** the court made the following observations regarding this aspect of the age of victims in such cases

> ***"In its wisdom Parliament chose to categorize the gravity of that offence (Defilement) on the basis of the age of the victims, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt…."***

In **ELIAS KASOMO KAINGU Vs REPUBLIC Crim Appeal No. 504 of 2010**, the Court of Appeal sitting in Malindi held that

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

In this case the complainant told the court that she was 12 years old. Ordinarily age is proved by way of production of a Birth Certificate an Immunization Card, School or other document which indicates the age of a child. However, even in cases where such documentary evidence of age is not produced courts have held that age may be deemed proved by oral evidence alone.

In **FAUSTINE MGHANGA Vs REPUBLIC 2012 eKLR,** Nzioka J cited the case of **MANGUNYU Vs REPUBLIC** in which it was held that

> ***"Age may be proved by a birth certificate, or particularly in the case of African's, by the evidence of a person present at the birth".***

In **RICHARD WAHOME CHEGE Vs REPUBLIC [2014] eKLR** the Court of Appeal held

> ***"……. It is our considered view that age is not proved primarily by production f a birth certificate…. What better evidence can one get than that of the mother who gave birth…."***

The complainant's own testimony that she was 12 years old, was corroborated by the evidence of **PW9 N N N** who was the child's father. **PW9** confirmed that the complainant was 12 years old. He stated that

> ***"She was born on 24/9/97"***

PW9 produced as an exhibit the complainant's Immunization card **P. exb 3** which indicated that the complainant was born on 24th September, 1997. This is a government issued document which can be taken as evidence of the child's date of birth.

In his submissions the appellant challenged the authenticity of this document. He argued that the card despite giving the complainant's date of birth as 24/9/1997 goes on to indicate that she received her first tetanus vaccination on 3/6/97 at the age of 6 weeks. The appellant's argues that the child born in September, 1997 could not have received her first vaccination in June 1997. However I have myself carefully perused the Immunization Card. The number **'6'** has clearly and obviously been altered. I will not speculate who did this or what the motive was. However I note that the correct date for the first Polio Vaccination as listed below was 3/11/1997 which was 2 months after the given date of birth. I find that the date of birth given in this document **P. exb 3** is correct. It corresponds to the evidence of the child and her own father. Having been born in September, 1997 the complainant was aged 12 years in June 2009. I find that the age of the complainant has been proved beyond reasonable doubt.

The second ingredient of the offence requiring proof is the act of penetration or in the case of attempted defilement the attempt at penetration. The complainant herself made reference to two incidences of sexual assaults by the appellant. She told the court that the first incident occurred on 15/6/2009. On that day the appellant called her and her 2 friends to go and arrange books in his office. After completing the task the appellant allowed the 2 girls to leave but told the complainant to remain behind. On that occasion the complainant stated as follows

> ***"As we were leaving he told me to remain behind. When I remained behind the accused person told me to hold his desk and bend over. I thought he wanted to cane me. So I did as he had directed. After I had bent over, the accused person came behind me. Before he came behind me, the accused person went to the window, and was looking outside the office. He then came behind me and unzipped his trouser and held me by my shoulders. I pushed him away and started crying. He stood up straight and told me to go away….. The accused person unzipped his trousers and removed this thing. I don't know what it is called. He removed the thing from his trouser. I think it is called a vagina. It is between his legs. The accused did not do anything else to me….."***

From her narration it is clear that no act of penetration took place on this day. What happened was an indecent sexual assault where the appellant exposed himself to the complainant.

The evidence regarding the events of this particular day are corroborated by **PW2 L W**. She confirmed to the court that on 15/6/2009 the appellant called the complainant, **PW2** and a child called **'G'** to his office to arrange books. **PW2** confirms that after the task she and **'G'** left, but the appellant directed the complainant to remain behind in his office. Thus **PW2** has effectively corroborated the evidence of **PW1** that the appellant remained alone with her in his office. This gave the appellant the opportunity to sexually molest the child.

The second incident referred to by the complainant occurred on 17/6/2009 just two days later. Again the appellant called for the three girls. The complainant went to his office with **'G'** and one **'J'**. Again the appellant sent the other two girls away saying that he only wanted to see the complainant. The complainant told the court that the teacher **'Mr. N'** who shared an office with the appellant left on his motorcycle.

On this occasion the child stated that the appellant covered her mouth with his hand and ordered her to lie down. He tore off her panty, unzipped his own trouser and proceeded to defile her. In her evidence at page 9 line 23 the child states as follows

> ***"When the accused person unzipped his trouser, he removed his penis and put it inside my vagina (pointing to her vagina). I felt a lot of pain. I stood up and went to the toilet and help myself then went home"***

Here there is clear evidence of defilement (penetration) by the child. She states clearly that the appellant put his penis into her vagina. The complainant stated that when she got up she noticed blood trickling on her thighs. This caused her to go to the toilet to wipe herself.

The complainant did not reveal the incident to anyone. It is only later due to persistent pains in her stomach that the complainant revealed the incident to her desk-mate called **'M'.**

The complainant was a young girl aged only 12 years. She was clear in her testimony and remained unshaken under a very lengthy cross-examination. The child had no reason to claim that she had been defiled if no such incident had actually occurred. She had nothing to gain by fabricating such a tale.

PW2 again corroborated the evidence of **PW1.** She told the court that on 17/6/2009 she was present when the appellant called the complainant to go to his office. Later on the complainant informed **PW2** that she had been raped.

PW3 M K a class-mate of **PW1** confirmed that the complainant did inform her that she had been raped by the Deputy Head Master. **PW3** advised the complainant to report the matter to their teachers. The complainant was reluctant to do so thus **PW3** took it upon herself to call one of their teachers.

PW5 E N was a teacher in the children's school. She told the court that on 22/6/2009 the complainant and M **PW3** went to her office. **PW3** told the court that the complainant had something to report. The complainant then informed **PW5** that the appellant had called her to his officer and defiled her. **PW5** shared the story with other teachers and also informed the Head-teacher.

PW6 I K was the guidance and counseling teacher in the school. She called the complainant after learning of the incident and questioned her. The complainant confirmed to this teacher that the appellant who was the Deputy Head Master had defiled her in his office.

PW7 F W was also a teacher in the school. She stated that she was instructed by the Head Master to take the complainant to hospital. **PW7** and other teachers took the child to Kemsa Clinic where she was treated and then was referred to Nakuru PGH.

PW4 J O O was the Head Teacher. He told the court that some of his female teachers informed him that the complainant had been defiled by the Deputy Head teacher. **PW4** assigned some teachers to take the child to hospital for treatment. **PW4** then confronted the appellant with the allegations. Then **PW4** went and reported the matter to the Municipal Education Officer.

The next day the father of the child who understandably was very irate came to the school with police who arrested the appellant. In her evidence the complainant stated that the appellant tore her panty. The appellant took issue with the fact that the torn panty was not produced in court as an exhibit. He submitted that this omission caused doubt on the veracity of the complainant as a witness.

Certainly the panty was a crucial exhibit and ought to have been exhibited in court. However the failure to so this did not in my estimation discredit the complainant's testimony. It must be remembered that the child did not report the incident immediately. She took a couple of days before she revealed the sexual assault to **PW3** and to her teachers. By this time the child had obviously bathed and washed her clothes. The failure to produce her panty as an exhibit was not fatal to the prosecution case and more importantly did not negate her evidence of defilement.

All these witnesses have given the court a similar account of what the complainant reported to them. At no time did the complainant vary or alter her story. She told the witnesses of both encounters which she had with the appellant in his office. She was consistent that it was during the second encounter that the appellant actually defiled her.

PW10 DR. AMOS OTARE was a gynecologist based at PGH- Nakuru. He told the court that he examined the complainant on 25/6/2009. He noted that she had healed bruises on her labia majora. He also noted that she had a broken hymen. Lab tests revealed the presence of bacteria in the child's urine. The bruises on the child's genitalia and the broken hymen are all clear proof of penetration. **PW10** stated that

> ***"I made an impression that D had been defiled based on bruises on her genitalia and absent hymen".***

The witness filled and signed the P3 form which he produced as an exhibit **P. exb 4.**

The appellant in his submissions challenged the evidence of the doctor on the basis that **PW10** was not the doctor who examined the complainant. That submission is not entirely correct. **PW5** told the court that she and the other teachers initially took the child to KEMSA Clinic. Thereafter the complainant was transferred to PGH – Nakuru where **PW10** personally conducted a second examination upon her. Thus this ground has no merit and it is hereby dismissed.

The evidence of **PW10** was expert medical opinion evidence from a qualified gynecologist. It was neither challenged nor controverted by the appellant.

From the evidence on record I am satisfied that the complainant was indeed defiled on the 17/6/2009 as she had alleged.

The final ingredient requiring proof in a case of Defilement is the identity of the perpetrator.

The complainant in her evidence identified the appellant who was the Deputy Head master of her school as the man who defiled her. The appellant was a teacher in her school and was well known to the child. Both incidences of 15/6/2009 and that of 17/6/2009 both occurred during school hours. Therefore it was daylight and visibility was good. The complainant spent a good amount of time in the office of the appellant and on both occasions she remained in the office alone with the complainant. The complainant identified the appellant by his given name **'Mr. Charles Owanga'**. She positively pointed out the appellant in the court.

PW2 who was a school – mate of the complainant confirmed having gone with the complainant to the office of the Deputy Head master. **PW2** states that their teacher had called them to his office ostensibly to arrange books. **PW2** confirms that they left the complainant alone in the office of the appellant.

PW2 and **PW3** the two school-children as well as **PW4**, the head teacher and **PW5, PW6** and **PW7** all teachers in the same school all confirm that the appellant **Mr. Charles Owanga** was the Deputy head teacher of the school. The witnesses also all confirm that the story books for the children were kept in the office of the appellant.

In her narration of events to all the prosecution witnesses the complainant named the appellant as the man who had molested her and also defiled her in his office. At no time did the complainant waver or change her story. She never at any time named any other person as the culprit. As I noted earlier in this judgment the complainant gave clear and concise evidence. She remained unshaken under cross-examination by the appellant. I have no doubt at all that the child was telling the truth.

The appellant in his defence denied having molested and/or defiled the complainant. He insisted that he had been framed by the Head teacher who did not want him in the school as due to his superior qualifications the appellant was a threat to said Head teacher. The appellant claimed that he had discovered and reported the theft of books from the school and this was the cause of the bad blood between himself and **PW4** and the other teachers.

In his defence the appellant did seek to have produced the O.B No. 4 of [Particulars withheld]. She said OB report was produced as an exhibit and I have perused the same. This OB report indicates that the appellant did go to Nakuru Police Station to report the theft of some books and stationary from his office. There is however absolutely no evidence to show that this report made by the appellant led to his being framed for a charge of defilement. According to the appellant his dispute was with the head master and his fellow teachers whom the appellant alleged was out to fix him

The complainant was a mere child of 12 years old. She had no reason or motive to seek to frame the appellant. The complainant would have had no interest or bearing in the investigations over the stolen stationery which was purely an administrative matter and she had nothing to gain by falsely implicating the appellant.

Similarly the other children who were witnesses like **PW2** would have had no interest in framing the appellant. I am not persuaded by this defence of the appellant and I dismiss the same.

The appellant in his defence also argued that he shares an office with a teacher called **'Mr. Nyambari'.** The appellant told the court that their office is only partitioned by a card board. Thus the appellant argues that if he had truly defiled the child in his office then the said **'Mr. Nyambari'** would have seen or heard something.

The complainant in her evidence told the court that when she remained with the appellant in his office the said **'Mr. Nyamwari'** got onto his motor cycle and rode away. Thus he was not present in the office at the material time. There is no evidence to show that this **'Mr. Nyambwari'** was in his office at the material time and the appellant did not call him as a defence witness.

The appellant also called as a defence witness a fellow teacher called **S M**. This witness was not able to shed any light on the events of the day. **DW2** told the court that he did not share an office with the appellant, thus he had no way to confirm whether the child was ever alone with the appellant in the office. The evidence of **DW2** quite frankly was of very little assistance to the court and did not in any way serve to exonerate the appellant.

In the basis of the evidence on record I am satisfied that there was a clear positive and reliable identification of the appellant as the man who defiled the complainant.

Although appellant initially faced a charge of Defilement of a child contrary to Section 8(11)(3) of the Sexual Offences Act, on 26/6/2017 the prosecution withdrew that charge and substituted it with the charge of Attempted Defilement of a girl contrary to Section 9(1) of the Act.

In her judgment the learned trial magistrate noted that the evidence adduced by the prosecution clearly proved the offence of Defilement. The trial magistrate then proceeded to convict the appellant of the charge of Defilement citing the spirit of the Sexual Offences Act and the provisions of Sections 186 and Section 183 of the Criminal Procedure Code.

I do agree that the evidence adduced by the witnesses in this case clearly established the offence of Defilement. However for reasons best known to themselves (which reasons I do not wish to speculate about) the charge was reduced to the lesser offence of Attempted Defilement.

Section 186 of the Criminal Procedure Code provides

> ***"186 When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it"***

This Section in my reading only becomes applicable where an accused is charged with the offence of Defilement and the evidence though failing to prove that charge is sufficient to prove another (less serious) offence, then the accused may be convicted of that less offence although he was not charged with it.

Any other contrary interpretation of Section 186 would in my view be erroneous and would be prejudicial to the accused. To convict the appellant of the more serious offence and an offence for that matter which he had not been charged with would amount to a serious miscarriage of justice.

Article 50(2)(b) of the Constitution of Kenya 2010 provides that

"(2) Every accused person has the right to a fair trial which includes the right –

(b) to be informed of the charge with sufficient detail to answer it"

To charge the appellant of the lesser offence only to convict him of the more serious charge which he did not face is in my view a breach of Article 50(2)(b)

In the case of **DAVID JEFWA KALU – Vs REPUBLIC [2007]eKLR** the Court of Appeal in dealing with a somewhat similar situation held as follows:-

"….. All the provisions of the Criminal Procedure Code which are under the heading:- "CONVICTIONS FOR OFFENCES OTHER THAN THOSE CHARGED" and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter, it would be outrageous for a trial court to convert that charge into murder simply because the evidence on record proves murder….."

The above authority applies ***'mutatis mutandis'*** to the circumstances in this case. The trial judge erred in convicting the appellant of the more serious charge of Defilement notwithstanding the fact that the evidence was sufficient to prove the above serous charge. The appellant's conviction on a charge which he did not face had no basis in law. I therefore quash the conviction of the appellant for the charge of Defilement.

Having said that I am satisfied that the evidence on recorded certainly proved the offence of Attempted Defilement and I substitute a conviction under Section 9(1) of the Sexual Offences Act. The sentence imposed by the trial court is hereby set aside. The appellant was a teacher who held a role ***'in loco parentis'*** to the complainant. Instead of providing guidance and protection to the child the appellant actively pursued her and molested her sexually on at least two occasions. His behavior was heinous. Although the minimum sentence provided under Section 9(2) is ten (10) years I find that the appellant abused his position of trust in respect to the young child. As such I impose upon him a sentence of twelve (12) years imprisonment. The sentence will run from the date of his first conviction by the trial court. Those are the orders of this court.

Dated and Delivered in Nakuru this 30th day of October, 2017

Appellant in person

Mr. Motende for DPP

Maureen A. Odero

Judge