**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 261 OF 2012**

**JOHNESH NYASIMI NYANG'AU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 4962 0f 2010 delivered by Hon. Onyina(P.M) on 11th October, 2010).*

**JUDGMENT**

**Background.**

*The Appellant, Johnesh Nyasimi Nyangau was charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. The particulars were that on 12th November, 2010 in Kajiado County, intentionally and unlawfully caused his male genital organ(penis) to penetrate the female genital organ(vagina) of M. K. O, a child aged 14 years. The alternate charge was that of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on 12th November, 2010 in Kajiado County intentionally and unlawfully touched the female genital organ (vagina) of M.K.O., a child aged 14 years.*

*The Appellant was duly tried and found guilty. He was convicted and sentenced to a minimum of 20 years in jail. He was dissatisfied with the verdict of the court, hence this appeal.*

***Submissions***

*The Appellant relied on his Amended Grounds of Appeal which were buttressed by the annexed written submissions all filed on 25th April, 2016. The Respondent was represented by Ms. Akuja who preferred canvassing the same by way of oral submissions. She made her submissions on 25th April, 2016.*

*The Appellant's submissions were that crucial elements of the offence of defilement were not proved, being age of the victim and penetration. Secondly, that rules of evidence were contravened namely by misapplying the tenets of Section 124 of the Evidence Act requiring the court to solely rely on the evidence of the victim only in convicting an accused. He submitted that the failure by the prosecution to call the Government Chemist (Analyst) and the arresting officer was a fatal blow to their case. Further, he submitted that Section 200 of the Criminal Procedure Code had been contravened by the three magistrates who had conducted the trial. Finally, he submitted that his constitutional right to a fair hearing under Article 50 of the Constitution was violated in that, despite his persistent request to be*

*supplied with witness statements, the trial proceeded before compliance.*

*Learned State Counsel, Ms Akuja for the Respondent in her submissions stated that the ingredients of the offence of defilement, namely; penetration, age of the victim and identification of the perpetrator were all properly proved. Further, that the Appellant's right to a fair hearing had not been infringed upon since he had participated in his trial without any complaint and had competently cross examined all the witnesses.*

***Evidence***

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. See ***Okeno Vs Republic*** **( 1972) EA 32.**

*The prosecution's case at the initial trial was that the complainant was on her way home from school when she ran into a man who she had previously seen on several occasions but who she did not know. They both exchanged greetings. After she had walked a short distance she noticed that the man was following her. After he caught up with her she asked him what he wanted and he replied that he wanted her to go to his house. The man's house was located next to the road and as the complainant approached the house the man pushed her towards the gate. She protested and he pulled out what appeared to be a knife and asked her to be quiet. He then led her into the house while still holding the weapon and ordered her to sit down after locking the door behind him. He then proceeded to remove her shoes before going to his room and changing into a pair of shorts. She tried to escape while he was away but she realized that the door had been padlocked. When the man returned he directed her into the bedroom where he pushed her onto the bed before putting a cloth in her mouth to gag her. He thereafter proceeded to remove her underpants, leaving her school dress on. He then removed his shorts before proceeding to have sex with her. He did it about 3 or 4 times according to the complainant who said that she had pushed him off three or four times as he tried 'to release some things into my vagina'.*

*There was a knock at the door and the man went to see who it was leaving the complainant on the bed. It turned out to be the complainant's mother who got into the house and asked the complainant what she was doing there. She narrated the whole affair. The mother then turned to the man and asked him why he had done that to her daughter. He got agitated and picked up a stool and threatened to assault her. The mother then screamed attracting people into the compound who upon hearing the on goings started attacking the Appellant.*

*The complainant and her mother reported the matter at Kiserian Police Station. Investigations were conducted by Police Corporal* ***Damaris Amenya, PW4****. The complainant who testified as PW1 gave her pants, blood and urine for examination. She was also taken for medical examination at Nairobi Women's Hospital which showed that she had a whitish vaginal discharge with a fresh hymenal tear at the 3 o'clock mark. There was also some bruising to the roof of the vagina which all led to the conclusion that there had been sexual assault. The report was prepared by Dr. Nzinza Liku and presented by* ***Dr David Thuo,PW3****.*

*A further examination was carried out by* ***Dr. Zephania Kamau, PW2****, on 7th March, 2011 who found that PW1 had no bodily injuries but her external genitalia and the hymen were broken.*

*At the close of the prosecution case, the trial magistrate ruled that the prosecution had established a prima facie case and put the Appellant on his defence. He gave an unsworn defence. He stated that on the date in question he had left for his construction job and on his way to lunch met a lady he knew who had previously sold him some goods on credit. She asked him to pay her whereupon he asked her to wait until Saturday, the following day, when he would pay. On his way back from lunch he met the lady again whereupon she stopped him and started scratching her legs while at the same time screaming. She then threw herself to the ground and since passersby had by now congregated started shouting that, "anataka anitoe nguo, uko na nia gani?", meaning 'he wants to remove my clothes. What is your intention? He also heard her say that he had a knife and wanted to stab her. The passersby on hearing this apprehended the Appellant and they also assaulted him. The lady then woke up and made a phone call*

*and thereafter a car arrived and the Appellant was taken to police station and incarcerated. Later the lady went to the cell accompanied by a girl and he was taken out of his cell whereupon they all proceeded to hospital. He was thereafter taken back to the police station and on the following Monday he was transferred to Ngong Police Station where he stayed for a week before being taken to hospital for an examination followed by his arraignment before the original trial court.*

*He contended that he did not understand the court proceedings and he was not even granted a chance to read the statements. He did not call any witness to support his defence.*

*This court having summarized the evidence and considered the respective rival submissions concludes that the issues for determination crystallize to:*

1. ***Whether the offence was adequately proved.***
2. ***Whether the rules of evidence were contravened.***
3. ***Whether Section 200 of the Criminal Procedure Code was contravened.***
4. ***Whether the Appellant's right to a fair hearing had been infringed upon.***

**Determination.**

On legal issues the Appellant submitted that the provisions of Section 124 of the Evidence Act were misapplied in that the court found that the complainant was a child of tender years contrary to the Children's Act which provides that a child of tender years is one under the age of 10 years. The Appellant went on to refer to a finding by the learned magistrate in his judgment that he had believed the evidence of PW1 notwithstanding that other crucial witnesses had not been traced to testify. The proviso to this Section merely allows the court to convict an accused based only on the evidence of the victim if it believes that the victim was speaking the truth. In that case, the magistrate did not in any way misapply the said provision. He reaffirmed to himself that he was satisfied that PW1 had given a true account what had transpired between herself and the Appellant.

The Appellant went on to cite the provisions of Section 19(1) of the Oaths and Statutory Provisions Act which provides on how the evidence of children of tender years should be adduced. This provision applies in situations when the court must make a determination, based on the age of the child witness, whether that child should give a sworn or unsworn evidence. It is a requirement in such circumstances that the trial court conducts a *voire dire* examination so as to determine whether the child understands the meaning of taking an oath before testifying and of telling the truth. In so determining, it is left to the objective assessment of the court to determine whether the child is of tender years. There has not been any one cast in stone definition of who a child of tender years is. A number of decided cases have attempted to avail the definition in this respect, thus providing the jurisprudence the courts have fallen back to. In the well reknown case of **Kibangeny arap Kolil vs Republic[1959] EA 92** it was observed that:

> ***"There is no definition in the Oaths and Statutory Declarations Ordinance of the expression "a child of tender years" for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under 14 years; although as was stated by GODDARD C.J in R vs Campbell(1) All E.R 272***
>
> ***"Whether a child is of tender years is a matter of the good sense of the court.."***

Again, **Mutuku and Korir, JJ** in **Gamaldene Abdi Abdiraham v Republic [2013] eKLR** delivered themselves as follows:-

> ***"In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided in the Children Act. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social, cultural and economic environment under which a particular child is brought up. Some children are slow developers while others are fast learners. It would therefore be prudent to test the intellectual capacity of a child witness before putting the child in the witness box."***

It is my view then that having regards to Section 19 of the Oaths and Statutory Declarations Act means it is left to the court's discretion on a case to case basis to determine the cut off age of a child of tender years is. In this case, the complainant actually gave a sworn statement after the court had conducted a *voire dire* examination and finding her fit to take an oath. The court was satisfied that PW1 would withstand the cross examination by the defence. And when this was done, upheld her evidence as truthful. I do not, in the circumstances, fault the manner in which the evidence of PW1 was accorded credence.

On non-compliance with Section 200 of the Criminal Procedure Code, i take it that he was referring to subsection (3) which provides thus;

> **"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."**

This court has looked at the proceedings. The hearing of the evidence in the matter in question was first carried out under Hon. Onyango who heard the evidence of PW1 and PW2. Thereafter, Hon. Nyakundi, on 28th July, 2011, stated that due to Hon. Onyango's transfer the matter **'would proceed under Section 200'(**supra). On 15th November, 2011 Hon. Ireri heard the evidence of PW3 without explaining to the Appellant the implications of Section 200. The trial was thereafter taken over by Hon. Onyina who complied with Section 200(3). The Appellant opted to proceed with the trial from where it had reached. Hon Onyina was the trial magistrate who proceeded with the trial to the end.

It is evidently clear that Hon. Ireri did not comply with the provisions of Section 200 which was prejudicial to the Appellant as he was not accorded an opportunity to elect to either have the case heard *de novo* or recall the witnesses who had already testified. Having noted this, I revert to sub section (4) which provides that a retrial should be conducted where, on ground of non-compliance with Section 200, an accused is materially prejudiced. I duplicate the same as under;

> ***"(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

In addition, there exists an avalanche of case law that have settled the principles the courts should consider in deciding whether a retrial should be ordered. In the case of **Fatehali Manji vs Republic[1966] EA343** the court stated:

> ***"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 purpose of enabling the prosecution to fill up gaps in its evidence at the first trial."***

Also in the case of **Ekimat v Republic(2005)1KLR,1982,** the Court of Appeal held that;

> ***"A retrial should not be ordered unless the court is of the opinion that on a consideration of the admission or potentially admissible evidence a conviction might result, each case must depend on its particular facts and circumstances but an order of the trial court should be made only where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***

In the present case, there is no doubt that PW1 gave a candid account of how the Appellant defiled her. In her evidence the Appellant was caught red- handed by her mother; only that, unfortunately, she could not be procured to testify. Her evidence was further corroborated by the medical evidence which confirmed the defilement within the period charged. The Appellant was in addition positively identified by PW1 as the assailant. Although clearly as eluded by the Appellant witnesses such as PW1's mother, the government analyst and the arresting officer did not testify, the absence of their evidence may not necessarily guarantee the Appellant an acquittal. Of concern to the court is that the government analyst

did not testify. This is an expert witness and even if the analyst who actually prepared the analyst report could not be availed, any other analyst could produce the report on his behalf. I am satisfied that there exists sufficient evidence that would enable the prosecution to procure a conviction. On that observation I do not think that a retrial would be aiding the prosecution to fill up gaps in the trial. Further, no prejudice would be occasioned to the Appellant. He was arraigned in court on 15th November, 2010 and convicted on 11th October, 2012. If convicted, he would be sentenced to a minimum of twenty years imprisonment. He has therefore only lost 6 years since the trial began. Defilement is a serious offence which ought to be concluded in a fair manner for justice to be seen to be done to all parties. In my view then, justice would only be served if a retrial is conducted.

In the result, this appeal partially succeeds. I quash the conviction and set aside the sentence. I order that a retrial be conducted. The Appellant shall be escorted to Kiserian Police Station not later than 24th May, 2016 for purposes of drafting a fresh charge sheet. Thereafter, he shall be escorted to court to take plea within the period stipulated under the Constitution. It is so ordered.

**Dated** and **Delivered** at **Nairobi** this **17th Day** of **May, 2016.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

1. ***Appellant in person.***
2. ***Miss Sigei holding brief for Miss Akuja for the Respondent***.