REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 252 OF 2011

LAZARUS OCHARO KIEYA..... APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

[An appeal from original conviction and sentence by Nyamira Principal Magistrate's Court (Hon. J. Wanjala, SPM) in Criminal Case No. 514 of 2010 dated 24th October 2011.]

JUDGMENT

0. The Appellant was on 24th October 2011 convicted for defilement contrary to section 8(1) (2) of the sexual Offences Act 2006 and sentenced on the 25th October 2011 to life imprisonment. The Appellant had been charged with defilement and an alternative charge of indecent assault with particulars as follows:

> *"Charge: Defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006*
>
> *Particulars of Offence: Lazarus Ocharo Kieya: On the 24th day of August 2010 at Makeri [Particulars withheld] in Nyamira District within Nyanza Province unlawfully and intentionally by use of his genital organ namely penis caused penetration to the genital organ namely vaginal of D K N a girl aged 10 years.*
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> *Alternative charge: Indecent Act with a child contrary to section 11 of the Sexual Offences Act No. 3 Laws of Kenya.*
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> *Particulars of Offence: Lazarus Ocharo Kieya: On the 24th day of August 2010at [particulars withheld] sub-location in Nyamira District within Nyanza Province unlawfully and indecently assaulted D K N by touching her private parts namely vagina."*

0. The prosecution's case in brief is that a child complainant of under 12 years of age within the provisions of section 8 (2) of the Sexual Offences Act was defiled by the Appellant inside his son's house when she sought shelter from the rain at his home while on the way to cut grass at the appellant's shamba for which grass the complainant's grandfather had paid. The defilement allegedly was confirmed by the complainant's mother who found the Appellant pulling up his trousers after the act and by medical examination of the complainant showing a broken hymen. The Police Medical Examination Form P3 for the complainant, her soiled dress and the clinic card indicating her date of birth as 4/11/1998 were produced in evidence.

0. Upon hearing the evidence presented by the prosecution and the Appellant when placed on his defence, the trial court found that the evidence of the complainant had been corroborated by the testimony of other witnesses, that the child was candid and therefore convicted the Appellant for defilement under section 8 (2) of the Sexual offences Act having found that the complainant was at the time of the offence aged 11 years and 9 months on the basis of a clinic card for the child victim produced in evidence by the prosecution. In its judgment, the court said:

   "In my view the evidence on record is sufficient to prove the charge of defilement. The evidence of the complainant and her mother was corroborated by the evidence of the clinical officer PW3, the grandfather PW4 and the investigating officer. The evidence of the child is candid. She went to cut grass then it started raining and she went to shelter at the accused's home. The accused person then took advantage of that and took her to his son's house to defile. Fortunate for the child her mother found the accused person in the act and he was clearly seen by the mother trying to button up his trouser."

0. The Appellant appealed primarily on the grounds that the charge sheet was defective; that the conviction was against the weight of the evidence; and that the age of the complainant was not established to warrant the conviction under section 8 (2) of the Sexual Offences Act, and the resultant sentence under the subsection was therefore unlawful and excessive, in any event.
0. During the hearing of the appeal, counsel for the parties – Mrs Asati for the Appellant and Mr. Orinda for the Director of Public Prosecutions made submissions as follows, and judgment was reserved.

   "<u>Mrs. Asati for the Appellant:</u>

   Appeal against conviction and sentence of the Appellant in Nyamira Principal Magistrate's Court case no. 514 of 2010 on offence of defilement contrary to section 8 (1) and (2) of the Sexual Offences Act. Charge sheet at p 3 of the Record. The Appellant was sentenced to 20 years on 25/10/11. The grounds of appeal are 5 as set out. We shall argue all the grounds together.

   Charge defective – [Evidence] offered at trial did not accord to the charge. The particulars of the charge were that the Appellant had defiled the girl aged 10 years. The evidence tendered had variance on the age of the child. PW1 at the time of testifying introduced herself as aged 12 years at p.10-11 of the Record. The date of testifying was 25/1/11. The offence is alleged to have taken place on the 24/8/2010. It was only 5 months from the date of the alleged offence to the date that she said she was 12 years. Going by the testimony, she would been 11 years 7 months and not 10 years.

   PW2 the complainant's mother said that at the time of the testimony the girl was 13 years old. She said that "last year (the year of the offence) she was 12 years old."

   PW3 clinical officer who examined the complainant at p. 23 of the Record said the victim was 12 years old.

   The P3 form at p.53 the clinical officer indicates age as 10 years old. The charge sheet does not accord with the evidence on the age of the complainant. The Court of Appeal has held that where the evidence does not accord to the particulars of the charge, the charge is defective. Section 214 of the CPC allows the court to amend a charge giving the accused a chance to respond to the new charge. The court did not take benefit of section 214 of the CPC and instead the court proceeded to convict the Appellant causing a miscarriage of justice.

   Constitutional right of the accused person to know the exact particulars of the charge that he is facing. Upto now the Appellant cannot tell the exact age of the girl who was allegedly defiled by him.

Age of the complainant. Provisions of section 8 of the Sexual Offences Act makes it crucial for the charge to be specific, and for the prosecution to prove the same for purposes of identifying the correct subsection under which to charge the accused and to determine the correct sentence.

The age of the complainant dictates the period of sentence. The age of the complainant was not proved. There are discrepancies in the charge sheet and the witnesses who testified. There was no birth certificate produced to conclusively prove the age of the complainant.

A birth certificate is conclusive proof. No age assessment was done even by PW 3, the clinical officer who examined the complainant as she admits at p.26. The ages which she testified to are what she got from the complainant as history. At p. 13 of record, the complainant said she was at nursery at 6 years and that she had done 8 years of primary school which should make her 14 years.

There was a doubt as to the age of the complainant and the court could not have been sure of what subsection to convict the appellant. The ages 12, 13 and 14 are outside the subsection (2) of section which is the subsection under which the Appellant was charged. The sentence under the subsection is life imprisonment. There was no basis upon which the court could have invoked subsection 3 to sentence for 20 years. The sentence of 20 years is unlawful.

I refer to the authority of Jon Cardon Wagner v. R., Nairobi HC Cri. Appeal No. 405 and 406 of 2009 at p.14 that production of a birth certificate or other age assessment is essential. There was variance in the age as stated in the charge sheet and as stated in the testimony of in court. The conviction was therefore against the weight of the evidence adduced in the case.

There were other contradictions in the evidence as to the manner of dress during the incident. PW1 at p.12 stated that she was wearing a long trouser. At p.16 she said she was wearing a long trouser and other clothes inside.

There was no independent witness to corroborate the testimony of PW1, PW2 and PW3. We submit the circumstances under which the offence is alleged to have been committed it is possible to avail witnesses. It was alleged to have been committed during the day in a home near a road to a nearby market and with many other homes in the neighbourhood. PW2 alleges that when she discovered what had been done to PW1, she together with PW1 screamed all the way from the home along the road to their home which is 1km away and it is said that nobody responded. I submit that this is unlikely especially given the nature of the allegation that they were screaming aloud. No explanation by the investigations officer PW5 as to why he did not avail an independent witness. PW1 and PW2 are mother and daughter. PW4 is the grandfather of the complainant and the father of PW2, all close members of one family. It was important to avail an independent witness because part of the defence was that it was a frame up because of a grudge between the two families on land and a son of the Appellant had been assaulted by members of the family of the complainant. The court rejected the defence without giving the reason for the same and believed the evidence of the prosecution witnesses.

In the face of the contradictions. A girl of 10 years was sent to harvest nappier grass for two people to carry. Her reaction to the defilement in p.14 of the record. What she said is not what is expected of a 10 year old being defiled by a man of the appellant's age. The incident is supposed to have taken place in the appellant's son's house. The I.O did not visit the scene to establish that such a house exists and even recover the victim's clothes alleged to have been left in the house. The I. O. did not avail a birth certificate. He relied on a clinic card which we submit is not authentic and cannot conclusively give the age of the complainant.

I refer to Court of Appeal decision in Yongo v. R (1982-1988) 1KAR 167 as to what the court should have done. I pray that the appeal be allowed and the conviction be quashed and

sentence set aside.

Mr. Ondari for the DPP:

I oppose the appeal. The evidence on record was sufficient. The charge was clear and no prejudice was caused to the Appellant so far as the evidence that was adduced against him was concerned. The test is the prejudice in the handling of the case by the court. There may be a discrepancy on the charge sheet as to the particulars of the age of the victim PW1 but the court was basically correct in reaching the conclusion that there was sufficient evidence that linked the Appellant to the defilement of a minor.

The penal sections of Section 8 of the Sexual Offence Act should not be an impediment on the way of justice. The Appellant was represented throughout the trial by an able counsel. The issues could have been differently treated in the first appeal were it not so. It is now an afterthought as these were not raised in the first instance. Every officer appearing for accused person in court ought to raise what should be raised at the trial. The court - being a first appeal - the court may rectify any error so long as the age of the victim may be discovered from the evidence.

PW2 at p.21 produced a clinic card – a photocopy without any objection by counsel for the appellant. It gives a clear indication of the age of victim. At p. 50 of proceedings in the Judgment the court finds the age of the victim as 11 years and 9 months below the age of 12 years under section 8 (1) (2) of the Sexual Offences Act. The issue of the age is an afterthought. The trial court was entitled to find as it did.

Sexual Offences are secretive by nature. We do not expect offence where there would be eye witnesses. In not bringing neighbours, there was no benefit to be gained by bringing independent neighbours who were not eye-witnesses. The circumstances of rain with people sheltering and the voice of the victim and state of mind with screaming. The place of the alleged incident being a homestead and not a village. It is not surprising that there were no independent witnesses. I urge the appeal to be dismissed. The trial court was able to see the witnesses testify before it. The facts in the two authorities do not agree with the facts of this case.

Mrs. Asati for the Appellant in reply:

First appeal latitude to correct the error of the trial court if the age of the victim is ascertainable from the evidence. We submit that the age of the PW1 is not ascertainable for the documents and evidence of witnesses. The Court will not be able to rectify because of the nature of section 8 of the Sexual Offences Act.

It is a matter of substantial justice where the penalty facing he Appellant is grave and there are specific provisions of the law which ought to have been adhered to and which were not.

Representation of the Appellant at the trial court and non-objection to the clinic card. The burden of proof lies with the prosecution. The Prosecution was required to prove beyond reasonable doubt the age by producing the right document. The two authorities relate to cases dealing with age of victim.

Independent witnesses

It ought to have been said in the trial court that it was not possible to produce independent witnesses. [They could have] called a witness to state that they had seen the victim and the mother screaming on the road. There was none and no explanation for such default was given."

Issues for determination

0. The issues for determination as the court considers this first appeal are threefold:
    a. Whether there was corroboration to the evidence of the minor child witness the complainant herein or whether there was sufficient evidence to convict the appellant.
    b. Whether the charge was defective in view of the variance of the particulars of the complainant's age as given in the charge sheet and as presented in evidence before the court.

The Law

0. Section 124 of the Evidence Act provides for requirement of corroboration save where the court is *'for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'* -

> "124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, *the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*
>
> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*

0. Section 8 (1) and (2) of the Sexual Offences Act provides for the offence of defilement and the penalty thereof where the victim is a child of 11 years or less 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."

0. Section 8 (3) of the Act provides for the penalty for defilement of a child aged between 12 years and 15 years as follows:

> "(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."

Analysis of Evidence and Determination

0. As a first appellate court, this court shall, in accordance with the authority of *Okeno v. R* (1972) EA 32, consider the evidence presented before the trial court and '*make its own findings and draw its own conclusions [and] only then can it decide whether the magistrate's findings should be supported [and] in doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness.'*
0. The eye-witness accounts of the complainant and her mother, PW1 and PW2 were as follows:

> *PW1 the complainant:*
>
> *"I used to go to cut the grass with my mother, but on 24th August 2010 I went alone because my mother was milking the cows. She told me to go to cut and she would come to carry. I went carrying a panga and a rope to the grass. When I reached there it was raining heavily and I went to shelter in the house of Mzee Lazarus. Mzee Lazarus was shaving his two grand children. He was sitting in a corridor shaving the children and I was standing near the door*

in that corridor.

He finished shaving the children and he told the children to go to bed to sleep. The time was 5.30pm. I could see one was roughly 4 years and [the other] 2 and a half years. They are smaller children to me. That hair he had shaved he collected together. Then he held my hands. He used his one hand and held my two hands and he held my neck. Then he pulled me to his son's house where we used to collect grass. There my mother had told me that this house belonged to his son.

Mzee Lazarus pulled me into the house of his son. There was nobody in that house. He put me down as he was holding my neck and my hands and he lay me down. That is when he removed my inner wear he stopped holding my hands but he continued to hold my neck at the front. He was holding my throat. He removed his long trouser. He did not wear anything under his long trouser. He lay on me when he was he was lying on me he put his thing into me. He put his male organ into my female organ which is here points at her vagina. I have forgotten what his male organ is called. Mine is called a vagina. After about 10 minutes as he lay on me doing he heard my mother calling me. My mother was standing outside the house. She was standing outside his son's house where we were inside. My mother called my name. I heard her voice when she called out but when I tried to respond he was holding my throat. Mzee Lazarus stood up and he started wearing his long trouser as he walked towards outside. The door was open when were inside. It has two doors. The inside and outside door. The outside door was open. The inner room has no door. We were in the inner room."

PW2 the complainant's mother:

"I sent my child to cut grass where father in law had leased grass from one Lazarus Ocharo who is the accused person in the dock. I sent the child to cut grass at 5.00pm. It is about one Kilometre from my home. I sent her to go ahead to cut grass and I will follow her to carry. I remained behind because I was milking the cows. After I finished milking I followed the child. It had started raining slightly. I reached the shamba I did not meet the child in the shamba. When I missed the child I did not see a panga and a rope she had carried. I went to the road. I met some people and I asked whether they had seen the child. They did not tell me. I went back to the shamba. I called my child and there was no response. I did not see her. In the houses of Mzee Lazarus I heard some noise of children. It was not far from the shamba. I went and I stood outside the house. I heard children talking inside. I called out and the children came out. They were 2 small children. I asked them if they had seen my child. They said they saw her but did not know where she was. I asked who else was in the home. They said their grandfather was present. I asked where is your grandmother, they said she went to the market. I asked the children where their grandfather was. They did not know. I sent them to check in their grandfather's bedroom to see if he is there. They went and came and told me that their grandfather is not there.

When I was leaving I saw the house of the son of Mzee Lazarus opened. But the son stays in Nakuru. I thought that perhaps the son had come back. I went and I stood at the door and I called out that who is in the house. There was no response. By then it was raining heavily. I stood inside the house. It is a two roomed house. I stood near the door into sitting room. As I was standing I saw Mzee Lazarus Ocharo coming from the inside room and he was pulling up his trouser. He had not put on the trouser. He was pulling up the trouser to wear. I asked him why he was wearing a trouser and I am looking for my child who is lost. Is my child locked in that house? He said in a confused state that my child was not there and he was looking about in the house. He rushed back in the room he had come from but still attempting to wear his long trouser. I moved closer to look inside the room where Mzee had come from. I did not see my child but I saw the sandles that my child was wearing under the bed. I have the sandles produced. These are the sandles. They have grown old now.

When I saw sandles I got surprised and I realized that my child was inside that house. I ran outside the house towards the road outside his gate. I started screaming outside but it was raining a lot. People did not hear. As I stood outside the gate and on the road screaming I saw my child coming from the same house which I had seen Mzee Lazarus and I had seen my child's sandles. The child came while crying. I confirmed from scream and I ran back home with the child. I continued to make noise and the child was crying. When I reached home I informed my father in law S O what had happened."

0. The Clinical Officer PW3 testified that she found a broken hymen but without any bruises or tears on internal or external genitalia of the complainant. She said:

"On examination she was stable clinically. She was febrile and there was no blood or made stains on clothes. No abnormality on physical examination of the whole body. The child was examined 2 hours after the time of the incident. Genitalia was normal externally no tears or bruises both externally and internal, but the hymen was broken. There was white vaginal discharge which was foul smelling but no vaginal bleeding. Laboratory investigation of urine showed numerous pus cells and yeast cells. VDRL was non reactive to rule out syphilis. VICT was done and it was negative. High vaginal swap was taken for vet preparation. There were numerous pus cells, ephithelious cells and yeast ells. No spermatozoa seen.. The child was put on POS – exposure prolyxis (antibiotics) and retroviral and postina II. I signed the P3 on 25/8/2010. My clinical findings were that there was penetration sexual intercourse. The broken hymen and laboratory investigation showed there was transmission of fungal and bacteria infection."

0. The child's grandfather, S O, PW4 testified that he had on the material day paid to the Appellant 'Ksh.150 which had remained' for the sale of grass and then told the complainant's mother to go to cut grass at the Appellant's shamba.
0. PW5 was the Investigating Officer who confirmed that he did not visit the scene of the alleged crime and only testified on what he was told by the complainant's mother PW2; that he did not escort the Appellant for examination; and that no person outside the complainant's family volunteered to record statements.
0. The Appellant in his defence gave a sworn testimony principally denied the defilement charge and alleged that the charges were a result of bad blood arising from a land dispute between his family and the complainant's family who were his relatives. He said that the mother PW2 and the child complainant PW1 had gone to his home seeking to buy grass which he declined because they had on an earlier sale of grass not cut it out properly:

"I did not touch the private parts of the child. I am a Christian. I did not touch that child. The child's mother asked me from where she was standing at the gate for grass. I told her I did not have grass to sell then I told her that the 1st grass I sold to them they cut poorly and I did not want to give them grass again. We exchanged words. The child then ran from the house. The mother and myself we abused each other she did not scream. She forced her child to say that she had been defiled. If she had screamed as she alleged the people at the Market place and people passing on the road would have heard. When they went and reached the market they went home. None came from the market to ask me what happened."

While the Appellant may have exaggerated the alleged bad blood between him and the complainant's family, in view of their continued relations by way of lease of grass an earlier sale whereof was conceded, to justify his claims of trumped up charges. However, it is never the duty of an accused to prove his innocence, and the prosecution was always under a duty even without the testimony of the Appellant to establish his guilt beyond reasonable doubt. The appellant may well have chosen to remain silent.

0. There are several factors in the circumstances of this case that militate against a finding that the victim of the defilement was telling the truth and therefore to justify a conviction under the proviso of section 124 of the Evidence Act. These are:

a. **That no independent witnesses, and PW2 alleged that no one responded, to the alleged mother and daughter's screaming for 1 km distance from the appellant's home to their home notwithstanding many homes and a market in between. It begs the question why the mother of child who had been defiled did not seek the assistance of the people at the nearby market in arresting the Appellant but rather went all the way to her home.**
b. **The reaction of the mother on seeing her daughter's sandles under the bed was to run out of the house rather than to insist that the Appellant produces her child for whose presence in the house was evidenced by the sandles.**
c. **The Appellant was himself not taken for medical examination that could have confirmed the defilement by the presence on him of the pus and yeast cells as allegedly found on the complainant indicating transmission of fungal and bacteria infection as found by the Clinical Officer PW3.**
d. **The investigating officer did not visit the scene and could not therefore confirm the complainant's testimony that she was laid on the earthen floor during the defilement and show consistency of the soiling of her dress to the colour of the earth on the floor of the house where the defilement allegedly took place.**
e. **The clinical officer's evidence of broken hymen is not corroborative of the complainant's testimony because it is not indicated whether the hymen was freshly broken or an old tear, and it does not therefore of itself independently implicate the Appellant in terms of section 124 of the Evidence Act.**
f. **There was discrepancy in the complainant's testimony in chief and on cross-examination as to appellants dress at the time of the alleged defilement claiming on the one hand that he only had a long trouser with nothing under and on the other hand that he had long trousers with an inner wear.**

0. Was there corroboration in terms of section 124 of the Evidence Act or was it unnecessary? Under section 124 of the Kenya Evidence Act as amended by Act NO. 3 of 2006, the court is entitled to convict on the evidence of the victim of a sexual offence if for reasons to be recorded, the court believes that the victim was telling the truth about the commission of the offence by the accused person.
0. With respect, the finding by the trial court that the evidence of PW1 was corroborated by the evidence of PW2, PW3 and PW4 and PW5 is erroneous in view of the numerous discrepancies in the prosecution evidence set out above. Moreover, the PW3 clinical officer's conclusion of penetration did not implicate the Appellant as required for conviction pursuant to section 124 of the Evidence Act as there was no conclusive proof that the penetration was caused by the appellant, there having been no examination of him. PW4 only testified that he had asked the complainant's mother to go to cut the grass after having paid a balance on no doubt a previous sale of grass. PW5 investigating Officer only repeated what the complainant's mother told him. PW2's testimony was riddled with unrealistic statements as demonstrated above and did not offer any corroboration of the child complainant's testimony.
0. Corroboration was however not necessary if the court for reasons to be recorded found that the child victim of sexual offence was telling the truth in accordance with the proviso to section 124 of the Evidence Act. Indeed, the court on first appeal is also enjoined to make allowance "*for the fact that the trial court has had the advantage of hearing and seeing the witness*" – see *Okeno v. R.*, supra. In its decision, the trial court made a positive finding on the candour of the complainant, as follows:

"*The evidence of the child is candid.*"

The trial court, in my view, could not have arrived at that conclusion in view of the discrepancies in the evidence as identified above.

Whether the charge was defective

0. As held in *Jason Akumu Yongo v. R* (1982-88) KLR 167, the fact that evidence is given differently to the particulars of the charge can still render the charge defective so as to bring section 214 into

operation. Section 214 of the Criminal Procedure Code is in the following terms:

*"**214.** (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:*

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

0. The particulars of the defilement in this case was that the victim's age was 10 years therefore falling within the provisions of section 8 (2) of the sexual offences Act under which the Appellant was charged. The evidence presented in court by the clinic card was that the child was 11 years 9 months at the time of the commission of the offence, which still fell within the provisions of section 8 (2) of the sexual Offences Act, the child not having reached the age of 12 years when the subsection (3) of section 8 of the Sexual Offences Act set out above would apply. It might be expedient for Parliament to clarify by amendment to sub-section (2) of section 8 of the Sexual Offences Act that the provision applies to all cases of defilement of children aged *under 12 years*.
0. I concur with the opinion of Warsame, J as he then was, in *Jon Cardon Wagner & Ors v. R* (2011) eKLR that the need to establish the age of the victim by a birth certificate, age assessment report or other reliable evidence is a fundamental requirement under the sexual Offences Act where penalties are determined upon the age of the victim. In this case, the child's clinic card was produced indicating that she was born on 4th November 1998.
0. However, as the same provision and penalty applied to the case whether the victim was 10 years or 11 years of age, no prejudice was occasioned the Appellant by the finding by the trial court that:

"At the time of the incident the complainant was aged 11 years and 9months. This is because the clinic card that was produced by PW2 shows that she was born around November 1998. She was therefore below 12 years. The charge under section 8 (1) (2) of the Sexual Offences Act still holds."

The trial court could have amended the particulars of the charge sheet under section 214 of the Criminal Procedure Code without prejudicing the Appellant in any way as the charge remained under the provisions and penalty prescribed in section 8 (2) of the Sexual Offences Act. I did not find the basis for the submission by counsel for the appellant that the sentence was for imprisonment for 20 years. At p. 48 of Proceedings and Judgement as well as on the Warrant of Committal for a Sentence given on 25th October 2011, it is clear shown that the sentence was life

imprisonment under section 8 (2) of the Sexual Offences Act.

Orders.

0. However, for the reasons set out above, this court does not find that the Prosecution has proved its case against the appellant in either the main charge of defilement under section 8 (1) (2) of the Sexual Offences Act or the alternative charge of indecent assault under section 11 of the Sexual Offences Act. The court therefore finds merit in the appellant's appeal which is hereby allowed, the conviction quashed and the sentence set aside. The Court, therefore, directs that the Appellant be released from custody forthwith, unless he is otherwise lawfully held.

EDWARD M. MURIITHI

JUDGE

Dated and delivered this 22nd day of January 2015.

J. WAKIAGA

JUDGE

In the presence of: -

Mr. Sagwe for Asati for the Appellant

Mr. Majale for State

Mr. Bibu Court Assistant