**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 123 OF 2012**

**WILLIAM KOECH KIYENG …… APELLANT**

**VERSUS**

**REPUBLIC …….... RESPONDENT**

***(An Appeal from the Judgment of the Senior Principal Magistrate Honourable B. N Mosiria in Iten Criminal Case No. 123 of 2012, dated 2nd March, 2012)***

**JUDGMENT**

1. The appellant was convicted of the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(3)*** of the ***Sexual Offences Act.*** The particulars of the charge were that on the 22nd day of October 2010 at [Particulars withheld] village in Keiyo North District in the Rift Valley province, the appellant intentionally and unlawfully caused penetration of his male organ into the vagina of *J S* a girl aged 14 years.
2. Upon conviction, the appellant was sentenced to 20 years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

In his amended grounds of appeal filed on 16th July, 2015, the appellant raised three grounds of appeal. He complained that the learned trial magistrate erred by basing his conviction on the evidence of the complainant which had been taken without having conducted a voire dire examination; that the trial magistrate erred in relying on a forged clinic attendance card to prove the age of the minor and that he was wrongly convicted as he was not medically examined to prove that he is the one who had infected the complainant with an infection.

3. The appellant prosecuted his appeal in person. He relied on written submissions which he submitted to the court. He in addition orally submitted that he had been framed with the offence by *Alex Tanui* and *Andrew Kirui* allegedly because he owed them Kshs.1, 400 and that no evidence was adduced by the prosecution to link him with the commission of the offence.
4. The state contests the appeal. Learned prosecuting counsel *Ms. Mwaniki* in opposing the appeal submitted that the medical evidence adduced by the prosecution proved that the complainant had been defiled and that the appellant was positively identified as her assailant; that though there was no medical evidence to prove that he is the one who had infected the complainant with a sexually transmitted disease, there was other evidence which established that he is the one who had committed the offence. Counsel further submitted that the record of the trial court demonstrated that a voire dire examination had been conducted on the minor before she testified and that as there was no evidence to prove that the immunization card was not authentic, it was a proper

document to prove the minor's age. She invited the court to dismiss the appeal for lack of merit.

5. This is a first appeal to the High Court. I am aware of the duty of the first appellate court which is to revisit and re-evaluate the evidence tendered before the lower court to draw my own independent conclusions regarding the validity or otherwise of the appellant's conviction. In doing so, I should be careful to remember that I did not see or hear the witnesses. See ***Pandya V Republic (1957) EA 336, Kariuki Karanja V R (1986) KLR 90.***
6. I have considered the grounds of appeal, the submissions by the appellant and the state as well as the evidence on record.

The appellant has complained that the learned trial magistrate erred in failing to conduct a voire dire examination before taking the evidence of the complainant.

A voire dire examination is an inquiry which a trial court is statutorily required to undertake before receiving evidence from a child of tender years.

See ***Section 19*** of the ***Oaths and Statutory Declarations Act .***

The purpose of a voire dire examination is to establish whether a child of tender years understands two things – first, whether the child is possessed of sufficient intelligence to understand the duty of speaking the truth and second, whether the child understands the nature and importance of an oath.

In ***Johnson Muiruri V Repubic (1983) KLR 445*** the court of Appeal held that a voire dire examination ought to be recorded in a question and answer format so that from the questions put to the child and the answers given, it would be possible even for an appellate court to determine whether the child understood the importance of the duty to speak the truth and the solemnity of an oath.

7. It is however important to note that a voire dire examination is only required to be conducted on children of tender years. A child of tender years is defined under ***Section 2*** of the ***Children's Act*** as a child under the age of ten years.

In this case, the particulars supporting the charge alleged that the complainant was 14 years old at the time the offence was committed. The same age was reflected in the P3 form and the Immunization card produced in evidence as Exhbt 4. It shows that the complainant was born on 2nd June, 1996 which further supports the claim that she was slightly over 14 years old at the time she testified in court. What this means is that the complainant was not a child of tender years at the time she gave her testimony and therefore a voire dire examination was not necessary in her case.

8. The appellant also complained that the clinic attendance card (immunization card) was not a Government document and that it should not have been used to prove the child's age. While proof of age is critically important in defilement cases as it is the age of the victim which determines the length of the sentence to be imposed on an accused person upon conviction, the age of the victim can be proved by not only production of birth certificates but by other modes of proof including the testimony of the victims parents, baptismal cards or other documents on which the victim's date of birth is reflected. In ***Joseph Kieti Seet V Republic (2014) eKLR H.C Machakos Criminal Appeal No. 91 of 2011*** *Hon Mutende* J held as follows:-

***"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni –versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus: In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"***

Again in ***William Odhiambo Siara V Republic H.C*** at ***Kisumu Criminal Appeal No. 77 of 2012***

***(2014) eKLR*** Hon. *Muchelule* J held as follows:-

***"I agree that because of the fact that the various sentences under the Act are dictated by the age of the complainant, it is incumbent upon the prosecution to prove age beyond doubt. For PW3, her mother (PW1) gave her date of birth to be 2/3/99. That was not challenged. She also gave her baptismal card which showed date of birth. It is notable that documents like birth certificates, baptismal cards or school admission papers will indicate date of birth and, unless they are shown to have been made at the time when prosecution was launched, are material corroborating evidence. An age assessment by a doctor would be useful, but is should be borne in mind that any such assessment is a medical approximation. I am satisfied that PW3 was 12 going to 13".*** I entirely agree.

9. In this case, PW2 who was the complainant's father testified that *J S* was born on 2nd June, 1996 and the same date of birth was reflected in the immunization card produced as exhibit 4. I did not come across any evidence to suggest that the said card was forged or that it was not authentic. There is no law which provides that age must be proved by a government document. I am satisfied that the document coupled with the evidence of PW2 were sufficient to prove the complainant's age. I therefore have no reason to fault the trial magistrate in her finding that the complainant was 14 years of age.
10. I now wish to turn to the appellant's submission that he was convicted on the basics of evidence which did not prove his guilt beyond reasonable doubt.

I have analysed the evidence on record. I find that PW1's evidence had material contradictions regarding the identity of her assailant which casts a reasonable doubt whether she was able to positively identify the appellant as her assailant.

In her evidence in chief, the complainant claimed that she was accosted by the appellant (whom she identified in court) on the material day as she was going to fetch water and that he defiled her. She claimed that she did not know and had not seen the appellant before. However in her evidence on cross examination, she changed her mind and claimed that she knew the appellant before the material date even by his name as she used to see him often at the water tank.

It is difficult to reconcile the two versions given by the complainant because if she actually knew the appellant that well before the incident including his name, and she was able to recognize him as her assailant, I do not see why in her evidence in chief she denied that she knew him previously other than the fact that she may have lied.

11. The evidence also reveals another contradiction in the prosecution case regarding the clothes the complainant had allegedly worn when the offence was committed.

According to the complainant, she had worn a dress and a T-shirt which her assailant tore when committing the offence. She identified them in court in the course of her testimony. But her father (PW2) who saw her that evening after her alleged ordeal claimed that she had worn a T- shirt and a white skirt which were dusty and torn. The same black T- shirt and white cream skirt were produced in court and marked as MFI 1 and MFI 2. The question that then arises is- who among these two witnesses was telling the court the truth?

This discrepancy in the evidence of PW1 and PW2 in my view creates a doubt regarding their credibility and when taken together with the medical evidence in the P3 form, it begs the question whether the offence was actually committed as alleged.

I say so because according to the evidence of PW6 and the evidence in the P3 form, while as PW1 was examined two days after the alleged defilement , only her hymen was found missing. There were no fresh tears, bruises or lacerations on her external or internal genitalia which would normally be expected from a child who had been defiled by an adult a few days prior to the medical examination. The mere absence of a hymen by itself is not evidence of penetration. The whitish

discharge noted on her vagina was not said to be a consequence of sexual intercourse and though PW6 in his evidence on cross-examination claimed that the bacterial infection noted on the minor was evidence of a sexually transmitted disease, this claim was not included in the P3 form.

12. The appellant in his defence gave a sworn statement in which he swore that he did not commit the offence as alleged. The burden of proof in criminal cases is always proof beyond reasonable doubt and this burden does not shift to an accused person save for the circumstances envisaged in ***Section 111*** of the ***Evidence Act***. Which are not applicable in this case.

Having carefully evaluated the evidence on record, I have come to the conclusion that the contradictions in the evidence adduced by the two key prosecution witnesses substantially weakened the prosecution's case.

The medical evidence in the P3 form did not help matters. Consequently, I have come to the conclusion that looked at in its entirety, the evidence tendered by the prosecution before the trial court fell short of establishing the appellant's guilt as charged beyond any reasonable doubt.

13. The law is that when a doubt emerges in the prosecution case, it ought to be resolved in favour of an accused person. If the learned trial magistrate had properly evaluated the evidence, she would probably have arrived at a different conclusion. In the premises, i am satisfied that the appellant's conviction was not safe. It should not be allowed to stand. I thus find merit in the appeal and I accordingly allow it. I quash the appellant's conviction and set aside the Sentence imposed by the trial court. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED** and **DELIVERED** at **ELDORET** this 21st day of October, 2015

In the presence of:

The Appellant

Mr. Mulati for the Republic

Mr. Lesinge Court clerk