REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 91 OF 2011

(Being an appeal from the conviction and sentence in Lamu Senior Resident Magistrate's

Criminal case number 414 of 2010 by Hon. Kithinji A.R on 10th August, 2011)

HUSSEIN ALI GENGA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged in the lower court with the offence of Defilement contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence are that on diverse dates between the month of March 2010 and 31st August 2010 at *[particulars withheld]* Trading Centre, Lamu County, the Appellant did cause his penis to penetrate the vagina of the complainant who was a child aged 13 years old. The Appellant had an alternative charge of having committed indecent acts with a child contrary to section 11(1) of the Sexual Offences Act NO. 3 of 2006.

3. The trial magistrate convicted the Appellant for the offence of Defilement and sentenced him to twenty one years in prison, thus this appeal.

4. The facts of this case are that on 28th August, 2010, the complainant, who was a child in class five at [Particulars withheld] Primary School, was alone at home. The Appellant who was their neighbour found the complainant in their house and removed her skirt and pants. He had sex with her and threatened to kill her if she screamed or told anybody about the incident and then went away. The appellant's mother found the complainant crying and when the complainant informed her that her son, the Appellant, had had sex with her, she told the complainant not to report the incident. The incident happened at about 4Pm.

5. The second time that the Appellant had sex with the complainant was when her mother had gone to their neighbour's funeral at night. The Appellant is said to have found the complainant sleeping, removed her skirt and pants and had sex with her. During the ordeal, he had a knife. The complainant informed the trial court that she used the spot light (torch) to see the Appellant.

6. The complainant further stated that the same year, during Ramadhan, the complainant went to buy sugar and the Appellant offered to escort her when she passed by his home. It is said the Appellant tied

the complainant's hands, carried her to his bed, removed her pants and had sex with her. It is the complainant's father who found the complainant outside the Appellant's house and directed the complainant to explain to her mother what the problem was. That was when the complainant disclosed what had happened to her. The matter was reported to the police and the Appellant was arrested and charged.

7. The clinical officer, Pw 3, informed the court that he was called at Mokowe Police Post on 31st August, 2011 at around 7Pm. He was informed that the complainant was been defiled on 29th August, 2011 at around 4Pm. Although the complainant did not have any injuries, Pw 3 confirmed that there was penetration.

8. In his defence, the Appellant denied having defiled the complainant. In his judgment, the learned Magistrate stated as follows;-

> **"She (complainant) appeared quite mature and intelligent and in fact one could have mistaken her to be between 16-17 years. She struck me to be very honest and knew what she was saying. The complainant testimony is supported by the doctor who after examination confirmed there was penetration. He also found her to be 13 years old."**

9. The Appellant's counsel submitted that the Magistrate erred in law when he failed to form an opinion, on a *voire dire* examination, whether the child understood the nature of an oath in which her sworn evidence could be received.

10. On the hand, the State counsel submitted that the evidence before the trial court was cogent and the Appellant was convicted on the basis of the said evidence.

11. As this is the first appellate court, I am required to re-evaluate the evidence that was tendered in the lower court, assess it and make my own conclusion. (**Okeno Vs R (1972) EA 322**).

12. The record shows that when the trial commenced on 29th December 2010, the Magistrate recorded as follows:

> **"Pw 1 female aged 13 years appears mature enough to give evidence on oath".**

13. There is no indication that before the learned Magistrate formed the opinion that the child was mature enough to give evidence on oath, he conducted *voire dire* examination. In the case of **Johnson Muiruri -vs- R, Criminal Appeal No. 44 of 1982**, the Court of Appeal held as follows:

> **"When dealing with the taking of oath of a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood..... The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth."**

14. The failure by the trial Magistrate in this case to record the terms on which he was persuaded that Pw1 understood the oath that she took, in view of the fact that she was 13 years old, is fatal to the conviction. It was important for the trial Magistrate to set out the questions and answers when deciding whether Pw1 understood the nature of the Oath that she took. In the case of **R v Lal Khan (1981) 73 Cr. App. R 190**, the Court of Appeal held that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen.

15. The failure by the Magistrate to conduct a *voire dire* examination or to give reasons why he believed a

child of 13 years was mature enough to give evidence on oath renders the conviction of the Appellant unsafe. Indeed, considering that the evidence of Pw1 that she was defiled by the Appellant was not corroborated by any other witness, the need of examination of the child's intelligence becomes even more critical. I say so because the only other witness who could have corroborated that the complainant was sexually assaulted is Pw 3, the Clinical Officer. In his P3 form, Pw3 found that the complainant's private parts were normal although her hymen had been broken. He did not state when the said hymen was broken.

16. PW 3 further stated that the complainant had normal vaginal discharge without any blood or evidence of veneral infection. The witness did not connect the Appellant to the broken hymen. In fact, this witness in his report concluded that there was no evidence of forceful sexual penetration or that indeed the Appellant had defiled the complainant.

17. In the circumstances, and for the reasons I have given above, I find that the failure by the learned Magistrate to record why he was satisfied that the complainant understood the oath she took and in the absence of any other evidence to connect the appellant to the alleged offence, I quash the conviction that was meted out by the learned Magistrate and set aside the sentence that was imposed. I shall, which I hereby direct that the Appellant be set free forthwith unless lawfully held.

Dated and delivered in Malindi this 28th day of March, 2014.

O. A. Angote

Judge