REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL APPEAL NO. 260 OF 2011

SAMSON MUNGAI NJENGA …….. APPELLANT

VERSUS

REPUBLIC …….....RESPONDENT

(From original conviction and sentence in criminal case number1299 of 2010 in the Principal Magistrate's court at Githunguri before B.M. Nzakyo (PM) on 4th October, 2011)

JUDGMENT

The appellant Samson Mungai Njenga was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. It was alleged in the particulars of the charge that on 21st October, 2010 at [Particulars Withheld], Kiambu County he defiled a minor aged three and half years old. In the alternative he was charged with the offence of indecent act with a female child contrary to Section 11 (1) of the same Act. The complainant was the same. After a full trial he was convicted and sentenced to life imprisonment. This appeal arises from the said conviction.

The Learned trial magistrate in arriving at the conviction relied heavily on the evidence of the minor child. On perusing the record I noted that before the evidence of the minor was recorded, the learned trial magistrate did not conduct a *voire dire* to establish whether or not the minor child was endowed with sufficient intelligence to understand the nature of an oath and the duty to tell the truth.

This was a grave omission which goes to the root of the entire case. The appellant was not represented in the lower court and that omission cannot be blamed on him. Even without going to the merits and the weight of the evidence of the other prosecution witnesses, I consider that omission sufficient to compromise the entire trial. The conviction therefore must be set aside.

The offence which the appellant was charged with is serious and the record shows that the appellant was arrested on 13th November, 2011. His trial ended with his conviction on 4th October, 2011. This was just about one year thereafter. From the date of his conviction and sentence to date, a period two and half years has elapsed.

I have considered whether or not to order a retrial in view of the circumstances in this case. A retrial would be ordered to meet the interests of justice and where no prejudice would be occasioned to the appellant. The time spent from the date he was arraigned in court for the first time, up to the time the order is made should also be considered. Such an order would not be made if, on the evaluation of the evidence, a conviction is not likely to be entered after a retrial.

Going by the seriousness of the offence and the fact that the appellant has spent two years of the life imprisonment imposed by the trial magistrate, and considering that the evidence on record would likely end with a conviction, I believe this is a proper case for a retrial. I can see no prejudice that would be occasioned upon the appellant.

Further to the foregoing, the offence having taken place just about three and half years ago, the memories of the witnesses may still be reasonably fresh to recount what they know about the offence.

Accordingly, the conviction and sentence are set aside and the appellant shall be released from prison and

escorted to Githunguri Police Station so that a retrial is commenced.

Orders accordingly.

SIGNED DATED and **DELIVERED** in court this **22nd day** of May **2014**.

A.MBOGHOLI MSAGHA

JUDGE