**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 3 OF 2009**

ALFRED KIPROTICH YABEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

**ALFRED KIPROTICH YABEI**, the Appellant herein, was convicted on his own plea of guilty for the offence of defilement contrary to **Section 8(1) (2)** of the **Sexual Offences Act No. 3** of **2006**. The particulars of the offence are that on the 12th day of January 2009 at [particulars withheld] Bomet District within Rift Valley Province he defiled **BCK** a girl aged 7 years. The appellant was thereafter sentenced to serve life imprisonment. Being dissatisfied he preferred this appeal.

On appeal, the appellant put forward the following grounds:

1. **The learned trial Judge erred in law and fact when she failed to analyze the evidence on record hence arriving at a wrongful conviction.**

2. **The learned Judge made a wrong decision in law and fact when the facts could not support the charge on record.**

3. **The trial magistrate erred in law and fact when he allowed the production of the said P3 by the prosecution instead of the maker of the document.**

4. **That trial magistrate erred in law and fact when he failed to interrogate the production of the clothing, underpants and the injuries which were consistent with the weapon used and which weapon was not disclosed by the doctor when the magistrate ignored/failed to address the same fully in his judgment.**

5. **The trial magistrate erred in law and fact when making a finding and conviction of the Appellant in circumstances and on evidence which can not sustain a conviction on the basis of beyond reasonable doubt as provided by the law.**

6. **The trial magistrate erred both in law and fact by affirming the production of a medical document which has material contradiction with the facts as stated.**

7. **The trial magistrate erred in law and fact having admitted Doctor's evidence on the P3 form and in contrast to the said report by the doctor analysis on the blood samples or forensic evidence from the scene and the complaint allegations found no evidence or any scientific link to the appellant to which the court made no finding or failed to address this critical part**

**of the evidence of the expert report and its inconsistency with the innocence of the Appellant.**

8. **The trial magistrate erred in law and fact when he failed to subject the doctor's report to interrogation on several errors in the report and on its bases the guilty of the Appellant was concluded and convicted as having been equivocal when it was not.**

9. **THAT the trial magistrate erred in law and fact when he completely ignored to address the inconsistencies in the medical report and which remained to support proceedings which were null and void as no offence had been committed and was not taken into account in the interest of justice.**

10. **THAT the learned trial magistrate did not direct himself correctly on the law relating to the admission of only available evidence of the P3 to support the conviction and sentence of the Appellant when it was all along clear that no offence as provided and its sentence provided had been committed to warrant conviction and sentence.**

11. **THAT in all the circumstances of the case the conviction and sentence of the Appellant is unsafe and unsatisfactory and should be set aside.**

12. **THAT the appellant has all along maintained his innocence and at no time has he ever been involved in any affront with the law nor involved in the commission of the offence as alleged.**

13. **THAT the trial magistrate erred in law and fact when there is no evidence on record that the trial was conducted in a language the Appellant understood contrary to section 198 of the Criminal Procedure Act.**

It is the submission of Mr. Nyaingiri, learned advocate for the Appellant, that the appellant was convicted on the basis of an offence under the definition section of the Act. For this reason the learned counsel was of the view that the plea was not equivocal. Mr. Nyaingiri further argued that the trial court should have considered the appellant's age by looking at his birth certificate before convicting him. It is also the appellant's submission that the medical evidence in form of the P3 form did not establish the charge. It is stated that the P3 form indicates that the victim was treated before examination, therefore the treatment notes should have been produced. The appellant further argued that there was no evidence showing what caused the hymen to break. Mr. Mutai, learned senior prosecution counsel opposed the appeal. He was of the view that the appellant had no right of appeal against conviction under **Section 348** of the **Criminal Procedure Code**. Mr. Mutai further pointed out that this court cannot interrogate the evidence on appeal yet there was no trial. He was also of the view that it was not necessary to tender treatment notes.

I have carefully considered the rival submissions. I think the main issue which was substantively argued is whether or not the plea was equivocal.

Ordinarily, the appellant is not entitled to appeal against conviction if the plea was properly taken but where the appellant raises a complaint on the manner the plea was taken, then he will be entitled to appeal against the order on conviction. That is the position in this appeal, hence the appellant is entitled to appeal against conviction. Mr. Nyaingiri has argued that the trial magistrate inserted **Sub-section 2** of **Section 8** of the **Sexual Offences Act** after conviction and sentence. He pointed that the ink used was black similar to that used during the appellant's conviction and sentence. Mr. Mutai was of the view that it was not possible for the trial magistrate to insert the aforesaid sub-section. I have examined the original record of the trial court and it is clear that the charge sheet presented before the trial magistrate was written in blue ink.

It is stated that the accused faced a charge of defilement contrary to **Section 8(1)** of the **Sexual Offences Act**. It is also apparent that **Sub-section 2** of **Section 8** of the **Sexual Offences Act** is written in black ink. The proceedings of trial magistrate is recorded in black ink. In my view it is possible the trial magistrate inserted the sub-section either before or after pronouncing the conviction and sentence. I agree

with Mr. Nyaingiri that **Section 8 (1)** is the section defining the offence while **Section 8(2)** is the section that creates the offence. It is therefore possible that the appellant pleaded to a charge based on the section defining the offence yet he was supposed to plead to an offence based on a section which creates the offence.

In the circumstances, the plea cannot be said to be unequivocal. The other point which was ably argued is whether or not the trial court should interrogate the evidence presented to support the charge. A critical examination of the proviso to **Section 207 (2)** of the **Criminal Procedure Code** will reveal that before sentencing the prosecution is required to outline the facts upon which the charge is founded. It would appear the court in first instance is required to critically examine those facts to see whether they establish the offence.

With respect, I agree with Mr. Nyaingiri, that it is a requirement that the court should examine the facts outlined by the prosecution to prove the offence or to at least establish the ingredients of the offence. This being the first appellate court I am enjoined to re-evaluate the case that was before the trial court. Though the trial magistrate did not analyse the medical evidence presented, I have on my part done so and I am satisfied that there was sufficient evidence to sustain a conviction. However because of the confusion created by the alleged insertion of **Sub-section 2** of **Section 8** of the **Sexual Offences Act**, it cannot be said that the plea was unequivocal. I am convinced there is need to declare which I hereby do, the appellant's trial as a mistrial.

The question which I must grapple with is whether or not I should order for a retrial. There is no evidence that if I make the order, the appellant will be prejudiced in any way. Both the appellant and the prosecution did not raise any objection when this court invited them to indicate whether or not they have any objection if this court made an order for re-trial.

In the end, the appeal is allowed. The conviction is quashed and the sentence is set aside. I direct that the appellant be retried before another magistrate of competent jurisdiction sitting at Bomet other than Honourable T. Okello. The appellant to be held in custody pending his retrial. The case should be mentioned before the Senior Resident Magistrate court, Bomet on 25th September 2013 for further orders and directions on the hearing of the case. I also direct that the case be heard expeditiously to avoid the case from procrastinating further.

**Dated, Signed and delivered this 20th day of September 2013**

**J.K.SERGON**

**JUDGE**

**<u>In open court in the presence of</u>**

Mr. Nyaingiri for Appellant

Mr. Mutai for the Director of Public Prosecution

Mr. Koech- Court clerk