SAID CHANGAWA JEFWA.....ACCUSED

VS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case no. 469 of 2009 of the Senior Resident Magistrate's Court at Lamu Before A.R.Kithinji)

JUDGMENT

1. The appellant was charged, tried, convicted and sentenced for the offence of defilement contrary 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the charge were that between 17th and 20th August 2009 at Lamu District, he defiled LGK a girl aged 11 years.

2. His appeal to this court is based on 4 amended grounds, admitted on 23/5/12 and argued through his written submissions.

Grounds 1 and 3 allege violation of the appellants rights under section 49 (1) F and 50 (2) (h) of the constitution while grounds 2 and 4 attack the quality of the evidence forming the basis of his conviction, in particular the alleged improper *voire dire* examination of the complainant, the issue of her age and the alleged failure by the trial magistrate to consider the appellant's defence. The state opposed the appeal and reiterated the evidence in the Lower Court.

3. On a first appeal this court is obligated to consider the trial evidence afresh and to draw its own conclusions (See OKENO VS R (1973) EA 322). Before doing so, it may be convenient to first dispose of the allegations of violation of the appellant`s constitutional rights under articles 49(1) F and 50(2) h.

4. The appellant was arrested prior to 14/9/09, when he was first arraigned in court, and a large portion of the trial took place before the promulgation of the new constitution in August 2010 which he has relied on. Secondly, the complaint regarding delayed arraignment in court should be a subject of a civil suit for damages (See JULIUS KAMAU MBUGUA V R(2010)eKLR.

5. The right in Article 50(2) h is for free legal counsel where "substantial injustice would otherwise result". Such situations would probably arise where the accused faces serious charges (See DAVID NJOROGE MACHARIA V R (2011)e KLR. The charge facing the appellant can be said to be serious in light of the prescribed punishment, but there is no evidence that the trial court ought to have anticipated that substantial injustice would occur if the appellant proceeded unrepresented. The charge is simple but a common one in this jurisdiction and no special factors are shown to exist so as to set it apart as a special case that required intervention under Article 50(2) h. It would go against public policy if courts were to gratuitously impose a burden on the state to shoulder the expense of legal counsel for persons charged on any offence that carries a heavy sentence. Besides the record shows that the appellant participated fully in

the trial. For these reasons I find no merit in grounds 1 & 3 of the appeal.

6. The prosecution evidence in the lower court was that LGK the complainant herein (Pw 1) was a girl aged 14 years in the material period. She resided at Lamu and was in class 7 at Mkomani Primary School. On 17/8/09 Pw 4 disappeared from home and was traced 3 days later on the night of 19/8/09 in the house of the appellant. She had had sex with the appellant. Her parents in the company of elders took her away and police had her examined by medical personnel.

The appellant was arrested and charged thereafter.

7. The appellant gave a sworn defence statement in which he admitted that he spent three days with the complainant since 16.8.09 and that the complainant had agreed to be his wife. He sent his mother to inform the complainant`s father but he was arrested instead.

8. The complainant gave evidence following a *voire dire* examination by the trial court. The examination did not take the ideal format of question-and-answer but the record shows that the trial magistrate was alive to his duty under section 19 of the Oaths and Statutory Declaration Act. The evidence of the complainant with regard to her presence in the house of the appellant in the material period was admitted by the appellant himself. The appellant said that the complainant agreed to be his wife and he sent his mother to report this to the complainant`s family.

9. The evidence of the complainant and that of the clinical officer, Pw 6 clearly shows that the complainant had engaged in sexual activity. The hymen was broken and the vagina tender. It is plausible in the circumstances of this case that the appellant had sex with the appellant. In his evidence-in-chief the appellant did not directly mention this aspect but during cross-examination he denied that he defiled the complainant.

10. That denial is not believable. Here is grown man who seduces a young girl and convinces her to marry him. He stays with her in a house exclusively for 3 days and even sends word of his intentions to make her his wife through his mother. It is not believable that he did not have sex with her. The denial in my view is effectively displaced by the medical evidence and the complainants` testimony as well as the circumstances.

11. It is not clear which witnesses the appellant suggests should have been called. At any rate, there was no legal requirement in this case to prove any fact by calling more than one witness (see section 143 of the Evidence Act).

12. Regarding the question of age, the prosecution evidence through the complainant (Pw 4) complainant`s mother FG (Pw 1), the father G K (Pw 5) and the clinical officer (Pw 6) leaves no doubt as to the age of the complainant. She was 14 at the time of the offence. In light of this evidence the trial court was entitled to accept that the complainant was 14 years old and a minor. The appellant`s complaint that the appellant`s age was not assessed therefore has no basis.

13. The above notwithstanding, the charge facing the appellant alleged that the victim was 11 years old. The evidence adduced showed her age to be 14 years and the trial court should have either required the prosecution to amend the charge or entered a conviction under section 8 (3) Sexual Offences Act before meting out the sentence of 20 years imprisonment in line with section 8(3) of the act. The omission is minor and no injustice has been occasioned thereby.

14. For purposes of the record I would set aside the conviction of the appellant “as charged” and substitute therefore a conviction under section 8 (3) of the Sexual Offences Act. That said however I have found no merit in this appeal and will dismiss it accordingly.

Delivered and signed in court this 20th July 2012 in the presence of the accused, Mr. Naulikha for the State, court clerk Evans.

C. W. MEOLI
JUDGE