REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 59 OF 2009.

SIMON EMANIKOR ....APPELLANT.

VERSUS

REPUBLIC...RESPONDENT.

(Being an appeal from the original conviction and sentence of G.M.A. Ong'ondo – PM in Criminal Case No. 366 of 2009

delivered on 21st October, 2009 at Kapenguria)

J U D G M EN T.

1. The **appellant Simon Emanikor** was charged with the offence of attempted defilement contrary to sections 9 (1) as read with section 9 (2) of the Sexual Offences Act. The particulars of the charge stated that on the 11th day of April, 2009 in West Pokot District of the Rift Valley Province, the appellant did intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **S.T**, a girl aged 8 years in violation of section 9 (1) (2) of the Sexual Offence Act No. 3 of 2006. The appellant also faced an alternative charge of indecent act with a child contrary to section 9 (1) of the Sexual Offences Act. The particulars of the charge stated that on the 11th day of April, 2009 in West Pokot District of the Rift Valley Province, committed an indecent act with **S.T**, a girl aged 8 years by touching her private parts namely a vagina.

2. The appellant pleaded not guilty and after trial, he was convicted and sentenced to 10 years imprisonment. Being dissatisfied with the conviction and sentence, he has appealed. In his petition of appeal, which is supported by his own written submissions, he has challenged the conviction on the grounds that firstly, the charge was defective. Moreover, the appellant contended that there was insufficient evidence that could have enabled the prosecution prove its case to the required standard. Further it was stated that essential witnesses were not called and the appellant's Constitutional Rights under section 72 (3) (a) of the Constitution were breached by the police because he was not arraigned in court within a reasonable time.

3. This appeal was opposed by the state**, Mr. Onderi**, the learned Senior Principal State Counsel submitted that the appellant was convicted based on very clear evidence. The age of the complainant was

confirmed by a birth certificate that showed the age of complainant was 8 years. There was overwhelming evidence by the complainant that while she was sleeping, she heard somebody trying to remove her under pants. At first she thought it was a sheep that had gained entry to where she was sleeping but when her underpants were removed forcefully, she screamed and this attracted the attention of PW2, PW3, PW4 and PW5 who were by the time not asleep but where talking in another hut. When they came to check on the complainant, she told them that a sheep was trying to remove her underpants. When they searched the house, they found the appellant hiding under the bed wearing only an under pant. The appellant was not supposed to be sleeping in that house. He also attempted to run away but he was apprehended and charged with the offence.

4. This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive to its own independent determination on whether or not to uphold the conviction and the sentence of the trial court. In so doing the court should bear in mind that it never saw or heard the witnesses as they testified before the trial court and give due allowance for that. I now wish to set out, albeit briefly, the evidence before the trial court. The trial magistrate noted on the proceedings *(although there is no indication that voire dire examination was carried out*). That the complainant understands the nature of taking an oath.

5. **S.T** PW1, a girl child aged 8 years testified on oath that on 11th April, 2009 at about 10.00 p.m. she had gone to sleep in her grandmother's house. While she was sleeping, she heard a cold thing touching her on the right leg. She screamed, at first she thought it was a sheep. V.C.T PW2, J.T PW3, and B.K PW4, and P. R PW5 who were in the adjacent hut all answered to PW1's distress and rushed to the hut where she was sleeping. They put on the lantern, and found PW1 screaming and touching her thighs while saying that a sheep had touched her thighs while she was sleeping. The sheep were never kept in that house so they thought it was a cat. When they looked under the bed they saw the appellant hiding under the bed. The appellant was only dressed in shorts and was holding his sandals with his hands.

6. The appellantwas not supposed to be sleeping in that house. He had been employed by PW3 as a herdsman and was supposed to be staying in a separate hut. When the witnesses found the appellant under the bed, he attempted to run away but they prevented him from escaping. Other neighbors responded and helped to tie the appellant with a rope. The matter was reported at the AP Camp to **Corporal Ronard Wafula (PW7)** of Kaibosi AP Camp. He visited the scene and found the appellant had been arrested by the members of public and beaten for an offence of attempted defilement. The matter was reported at Kapenguria Police station and was investigated by **PC Walter Otieno Ojwang** PW6. He recorded statements from the complainant and also obtained the birth notification of the complainant which shows that she was born on 7th August, 2001 therefore she was 8 years old. He charged the appellant with the offence of attempted defilement.

7. Put on his defence the appellant gave a long story of how he was employed as a herdsman with effect from 3rd October, 2009. He had requested to be paid a half of the salary before he could start work but he kept on demanding for the payment which was not forthcoming from PW3. The appellant said he continued working, looking after the cows and tending the shamba. He was woken up at the material night at 9.00 p.m. by PW3 with her son and was told that he had done attempted to defile the complainant. They started beating him; thereafter the police arrested him and charged him with the offence of attempted defilement. The trial magistrate evaluated the above evidence and found the prosecution and established the case to the required standard. The appellant was convicted for the main count and sentenced to 10 years.

8. The only problem I find with the proceedings is that the learned trial magistrate did not make a specific finding that was demonstrated in the proceedings *by voire dire* examination of the complainant,

before receiving the evidence her evidence. It is necessary for the trial court to examine complainant who is of tender age and be satisfied that she possessed sufficient intelligence and that the minor understood the duty of telling the truth as required by section 19 of the Oaths and Statutory Declaration Act. I find the learned trial magistrate only indicated on the proceedings that the complainant understands the nature of giving sworn evidence. The requirements of section 19 were not followed. The trial magistrate was supposed to conduct a v*oire dire e*xamination for the complainant, this as it was held in the case of **JOHNSON MUIRURI VS. REPUBLIC [1983] KLR PAGE 445** where the Court of Appeal held that:-

"1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convincing on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the question and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided".

6. Due to this fatal oversight on the part of the trial magistrate, I am not satisfied that the appellant was subjected to a fair trial. I have also considered whether this matter should be referred for retrial. However bearing in mind the appellant has served a portion of the sentence and he was also subjected to mob justice when he was arrested. I am of the opinion that a retrial will not serve the ends of justice. The sentence served can be said to be adequate punishment and hopefully the appellant has learnt a lesson. According, I allow the appeal, quash the conviction and set aside the sentence of 10 years. The appellant shall be released forthwith unless otherwise lawfully held.

Judgment read and signed this 25th day of February, 2011.

M.K. KOOME.

JUDGE.