REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 336 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 570 of 2008 of the Senior Resident Magistrate's

Court at Taveta: J.M. Githaiga – S.R.M.)

ROBERT MATAYA KODI ..... APPELLANT

=VERSUS=

REPUBLIC ..... RESPONDENT

JUDGEMENT

The Appellant **ROBERT MATAYA KODI** has filed this appeal to challenge his conviction and sentence on a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) AS READ WITH S. 8(3) OF THE SEXUAL OFFENCES ACT 2006.** The particulars of the charge were as follows:

"On the 3rd day of August 2008 at about 3.00 p.m. in Taveta District within Coast Province had carnal knowledge of K.N a girl of the age of 11 years"

The Appellant was first arraigned in the lower court on 7th August 2008. The charges were read out to him and he entered a plea of ***'not guilty'***. His hearing commenced before **HON. J.M. GITHAIGA**, Senior Resident Magistrate on 2nd September 2008. The prosecution led by **CHIEF INSPECTOR ONGERI** called a total of four (4) witnesses in support of their case.

The brief facts of the case were that on 3rd August 2008 at about 3.00 p.m. the complainant **K.N** a child aged 11 years had been sent by her mother **H.N PW2** to fetch water at river Njoro. She left with a donkey to help her carry the water containers. On the way home the complainant spotted the Appellant sitting atop a tree. He had sprayed perfume on himself. The Appellant called her to him but she declined. The Appellant then caught hold of the complainant and pulled her into some nearby bushes. He ordered her to undress at knife-point. The complainant removed her underwear. The Appellant then proceeded to defile the complainant. Some boys passed by and **PW1** called out for help. The Appellant then released her and she ran home where she informed her mother what had befallen her. **PW2** went back to the scene with the complainant and tracked the Appellant's footprints to a nearby house. **PW1** pointed out the Appellant as the man who had defiled her. He was arrested and taken to the police station. The complainant was taken to Chalia Dispensary where she was treated and discharged. Police completed their investigations and the Appellant was charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied the charge. On 29th October 2008 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the charge of Defilement and thereafter sentenced him to twenty-four (24) years imprisonment. Being aggrieved with both his conviction and sentence the Appellant filed this present appeal. **MR. ONSERIO** who appeared for the Respondent State opposed the appeal and made oral submissions in which he urged this court to uphold both the conviction and sentence of the lower court. The learned State Counsel did also indicate his intention to seek for an enhancement of sentence from the 24 years imposed by the trial court to a term of life imprisonment as provided for by S. 8(2) of the Sexual Offences Act. This intention was duly conveyed to the Appellant who replied:

"I do understand. I still wish to pursue my appeal".

Therefore this appeal did proceed for hearing.

The appellant in his written submissions takes issue with the decision of the trial magistrate to receive sworn evidence from the complainant who was a child of 11 years old. The law specifically provides for the procedure to be followed in recording the evidence of a child of tender years. Although the term ***'tender years'*** is not defined it is generally taken to mean a child aged 12 years and below. The complainant in this case being aged 11 years fell within this category. S. 19(1) of the Oaths and Statutory Declarations Act Cap 15, Laws of Kenya provides for the taking of evidence of children of tender years. This section provides:-

"19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court or such person he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with S. 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section"

In order for a trial court to determine and form an opinion on whether a child of tender years does comprehend the nature of an oath the trial magistrate must conduct what is commonly referred to as a '***voire dire'*** examination of the child. The term ***'voire dire'*** is a French expression which now has developed common usage in legal parlance and literally translated simply means ***'speak the truth'***. How is a trial court supposed to go about conducting such a ***'voire dire'*** examination? The ingredients of a ***'voire dire'*** examination were set out by the Court of Appeal in the case of **JOHNSON MUIRURI –VS-REPUBLIC [1983] KLR 445.** In that case their lordships held inter alia that:

"(2) It is important to set out the questions 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) The judge [or magistrate as the case may be] is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. <u>The failure to do so is fatal to the conviction</u>"
[my own emphasis]

In the present appeal the trial magistrate failed to conduct any ***'voire dire'*** examination on the complainant and if such an examination was conducted it was not properly recorded. All that appears at page 2 line 1 of the record is:

"PW1 (minor aged 11 years who appears to the court on conducting a voire dire, to know the meaning of an oath, the duty to tell the truth while on oath besides the consequences of telling the court

falsehoods while on oath) sworn states in Kiswahili"

The complainant is then sworn and proceeds to testify. This does not meet the legal requirements of a ***'voire dire'*** examination and does not even come close. The questions put by the court to the child and her responses thereto were not recorded. As such this appellate court is unable to make any assessment of whether the trial magistrate's conclusion that the child did comprehend the nature of an oath was merited or not. This failure by the trial court to comply with the ingredients set out in the **Johnson Muiruri** case is fatal to the subsequent conviction of the Appellant. On this ground alone this appeal succeeds.

I do feel that it is imperative to note that in addition to the flawed purported voire dire examination on the minor complainant, the prosecution made no effort to provide the trial court with proof of the alleged age of the minor. Both the complainant and her mother **PW2 H.N** gave her age as 11 years. Not a shred a documentary evidence was adduced by the prosecution to prove that the child was in actual fact 11 years old. No evidence was tendered to prove the date of her birth. Offences under the Sexual Offences Act are without a doubt very serious in nature. Apart from the negative stain on ones character that a conviction on such an offence would leave, the penalties provided for in the act are very severe often involving lengthy minimum mandatory terms of imprisonment upto and including a mandatory term of life imprisonment. With the stakes being so high the prosecution must provide concrete proof of each and every element of the charge. In cases of Defilement under S. 8 of the Sexual Offences Act, it is essential that the age of the child be ascertained as this age will inform not only which provision the charge will be brought under but also what minimum mandatory sentence will apply upon conviction of such a charge. A mere casual statement that the victim is this or that age will not suffice. Proof of age must be provided. Such proof would include a birth certificate, baptismal card, Health Vaccination Card, school records or any other document which states the year of birth of the victim. Failure to adduce such evidence means that one vital element of the charge remains unproven thus in such circumstances a conviction would be unjustified. In the present appeal I note that no documentary proof was availed to show the exact age of the complainant. This too negates the conviction of the Appellant.

Based on the foregoing I find that this appeal is merited and it is hereby allowed. The conviction of the Appellant by the lower court is quashed and the subsequent 24 year term of imprisonment is also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 18th day of April 2011.

M. ODERO
JUDGE

In the presence of:
Appellant in person
Mr. Onserio for State