· **REPUBLIC OF KENYA.**

· **IN THE HIGH COURT OF KENYA**

· **AT KITALE.**

· **CRIMINAL APPEAL NO. 34 OF 2010.**

PAUL EKARAN MOTOGA :::::::::::::::::::::::::::::::::::::: APPELLANT.

· **VERSUS**

REPUBLIC :: RESPONDENT.

(From the original conviction and sentence of T. Nzyoki – SRM in Criminal Case No. 471 of 2008 delivered on 18th March, 2010 at Lodwar.)

J U D G M E N T.

The appellant **Paul Ekaran Motoga** was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, 2006. The particulars of the offence stated that on diverse dates between the 8th to the 12th August, 2008 in Turkana Central District within Rift Valley Province he unlawfully and intentionally caused penetration to genital organs of **R.A.E** a girl aged 16 years. The appellant pleaded not guilty, after trial, he was found guilty and upon conviction he was sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence, the appellant appealed and in his petition of the appeal he has raised 14 grounds of appeal.

In further arguments in support of the grounds of appeal**, Mr. Samba**, learned counsel for the appellant faulted the conviction of the appellant of the charge of defilement. Counsel submitted that the age of the complainant was not ascertained and could not have been ascertained from the conflicting evidence before the trial court. It was common ground that the complainant gave birth to a child in January, 2002 and this was confirmed by the official records that were produced as evidence by **Joseph Agai (DW2)** who worked at the Civil Registration Department Births and Deaths. He produced the records to show that the complainant gave birth to a boy child on 14th January, 2002. As at the time of birth, the records indicated that the complainant was aged 16 ***years*****.**

The complainant testified that she was born in 1992 and during cross examination she admitted that she gave birth to a child in February, 2001 and the child was at the time 7 years old. When the complainant was recalled for cross examination, she gave a different version that she was 13 years old when she gave birth to the child. It is therefore common sense that the complainant if she was born in 1992, and she gave birth in the year 2001, she was only 9 years old. The prosecution did not produce the birth certificate to prove the age of the complainant, in the face of the complicating evidence of the age of the complainant. The court relied on the age assessment which was done by **Bernard Bundotich, (PW4**) a clinical officer working at Lodwar District Hospital.

According to counsel for the appellant, the evidence by the complainant, her father and clinical officer were at variance with the charge sheet, the evidence was also inconsistent. Those inconsistencies should have been resolved in favour of the appellant. It was further argued that the complainant contradicted herself when she first testified she claimed that she was living with the appellant as husband and wife. Later on she changed her version of story and alleged that she was forced by the appellant to accompany him and was locked in a house where she was subjected to sexual orgies. The decision of the learned trial magistrate was also faulted because the learned trial magistrate took judicial notice of the extraneous matters which are

not of public notoriety. Education is not a matter of public notoriety because it depends on many circumstances and there are no fixed circumstances within the education system that can lead the court to confirm a particular age of a student.

The state conceded to this appeal; **Ms. Bartoo**, the learned state counsel submitted that the charge sheet was defective because the particulars of the offence are at variance with the charge sheet. It was also conceded that the trial court erred by proceeding to take judicial notice of matters that are not of public notoriety. The state was of the view that the matter should be referred for retrial. 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 prosecution's case was supported by the evidence of 5 witnesses. **R.A.E PW1,** and the complainant in this matter testified that on 8th August, 2008, she had closed school and on her way home she met with the appellant who escorted her on a motor cycle to his brother's house where they stayed as man and wife for 6 days. Within those 6 days the appellant was having sex with the complainant. She told the court that she was 16 years old. On the sixth day, the complainant's father **J.E.E (PW2)** rescued the complainant in the company of the police officer's and Children's officers. The complainant was taken to Lodwar District Hospital where she was examined by **Bernard Bundotich PW4**, who confirmed that the complainant had evidence of pus cells which was indicative of a venereal disease. PW4 also carried out age assessment on the complainant and found that she was 16 years.

The appellant was put on his defence; he gave a sworn statement of defence and denied having committed the offence. He also relied on the evidence of **Joseph Agai, DW2** who produced records to show that the complainant had given birth on 14th January, 2002 and it was indicated she was 16 years of age as at the time of giving birth. The state conceded to this appeal and rightly so, for the reasons that it is clear from the evidence by the complainant, her father, PW4, the clinical officer and DW2, the Record Officer from the Department of Registration of Births and Deaths that there was doubt regarding the age of the complainant. The age of the complainant could not have been resolved in the face of the evidence on record.

It is particularly not worthy that the complainant had given birth in January, 2002 and her date of birth was indicated as 16 years. The complainant told the court that when she gave birth in 2002, she was 13 years old. This offence took place in August, 2008. It is common sense that the complainant could not have been 16 years. The age of the complainant was an issue and remained an issue up to the time the learned trial magistrate issued his opinion. Accordingly, I am in agreement with the appellant and the State Counsel that the charge was not supported by the evidence and this appeal should succeed.

This now leads me to the issue on whether this matter should be referred for retrial. The principles to take into consideration are well set out in the case of; **EKIMAT VS. REPUBLIC C.A. CRIMINAL APPEAL NO. 151 OF 2004 (ELDORET) (Unreported**) where the Court of Appeal reiterarted the principles that:

§ "***We are also referred to the judgment in*** *Pascal ClementBraganza vs. R. [1957] EA 152****. In this judgment the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.'***

§ ***There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

· In this case, I find the prosecution failed to carry out appropriate investigations. There were inconsistencies in the evidence of the complainant and a retrial will not serve the ends of justice. The prosecution will take the opportunity to fill the gaps in their poorly investigated matter. The appellant must have the benefit of doubt, and this appeal must succeed. The conviction is quashed and the sentence of 20 years is hereby set aside. The appellant shall be released forthwith unless he otherwise lawfully held.

· **Judgment read and signed this 6th day of May, 2011.**

M. KOOME.
JUDGE.