**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CRIMINAL APPEAL NO. 148 OF 2007**

**BETWEEN**

**P.M.M..... APPELLANT**

***VERSUS***

**REPUBLIC .....RESPONDENT**

***(Appeal from the original Judgment & Conviction in the Senior Resident Magistrate's Court***

***at Karatina in Criminal Case No.43 of 2006 by P.C. TOROREY – Ag. P.M.)***

**J U D G M E N T**

The appellant, **P.M.M** was charged before the Senior Resident Magistrate's Court at Karatina with the offence of defilement of a girl contrary to *section 145(1)* of the Penal Code. He also faced an alternative count of indecent assault on a girl contrary to *section 144 (1)* of the Penal Code. He entered a plea of not guilty to both counts and was tried. The brief facts of the case are that the appellant is the father of the complainant **V.W**, a girl aged 7 years. The appellant and his wife **L.W** (PW1) had a fall out and are separated. Their two children **V** and her sister **P** (2 years) were living with their mother PW1. On the 21st October, 2005 PW1 left her said two children at a day care centre as was her normal routine and went to work. She returned in the evening to pick them upon only to find both girls gone with their father, the appellant. She went to the home of the appellant and found him drank and would not allow her to collect the girls. The following day she returned from work to find the children had been brought back to the day care centre. She however noted that the complainant walked with some difficulty. Upon examination on her genitalia at home she noted a yellowish discharge and upon interrogating the complainant narrated her ordeal at the hands of her father who infact had defiled her.

A report was made to at Karatina Police Station and was booked by **PC Mugia Lolale** (PW2). In the company of PW1, they both took the complainant to hospital for treatment. The complainant was issued with a P3 form. She was examined by **Dr. Kiringo** who formed the opinion that there was evidence of penetrative sexual intercourse. The appellant who had gone underground was later arrested on 18th January, 2006 and charged before court. The appellant denied the charge and merely gave an account of his arrest in his sworn statutory statement. Under cross-examination he sated that he could not recall the events of 21st October, 2005 that formed the basis of his arraignment in court.

After careful consideration of the evidence as a whole the learned magistrate did find for the prosecution, convicted the appellant and sentenced him 20 years imprisonment.

The appellant was aggrieved by the conviction and sentence. Accordingly he lodged the instant

appeal on the grounds that the learned magistrate erred in law and fact in not directing the prosecution to amend the charge when the evidence supported the charge of incest and not defilement, crucial witnesses were not summoned to testify and finally that the prosecution evidence was doubtful and full of contradictions.

At the hearing of the appeal, the appellant appeared in person and urged the court to re-examine the entire evidence on record. It was his view that he was framed in the case by his wife (PW1) with whom they had separated.

The state opposed the appeal. **Mr. Makura**, learned Senior State Counsel submitted that the conviction was proper. Alternatively that the appellant could have been charged with incest. The complainant and her mother gave very clear evidence. Their evidence was corroborated by PW4 who examined the complainant. The examination revealed a perforated hymen and numerous pus cells. The opinion of the Doctor was that there had been penetrative sexual intercourse. The learned senior state counsel further submitted that the evidence was sufficient to convict the appellant for the offence of defilement and or incest. On sentence, **Mr. Makura**, submitted that the maximum sentence at the time was life imprisonment with hard labour. Even for incest, the complainant having been below the age of 13 years the maximum sentence was still life imprisonment. The appellant was sentenced to 20 years imprisonment. Accordingly the sentence was.

I am required by law as a first appellate court to submits to exhaustive appraisal of the evidence tendered in the trial so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so however I have to bear in mind the benefit enjoyed by the trial court as it observed the witnesses as they testified and make due allowance. **See Okeno V Republic (1972) EA, 37**.

However, I do not think that the fate of this appeal will turn on the evaluation and re-examination of the evidence tendered in the trial. It will be determined on a narrow technical and procedural irregularity committed by the learned magistrate during the trial.

The complainant, **V.W**, it is common ground, that she was aged 8 years. She was thus a minor. Being a minor, it is a requirement of law that before her evidence could be taken, the learned magistrate was required to conduct a voire dire examination to determine whether she understood the importance of telling the truth and the meaning of an oath. It is a mandatory requirement that before the evidence of a minor is taken, that minor must be subjected to voire ire examination. Failure to conduct such voire dire examination renders the evidence of the minor inadmissible.

From the record of the learned magistrate, it is apparent that she never conducted voire dire examination of the complainant. Accordingly her evidence was inadmissible and could not have been acted upon.

The record though shows that the complainant was cross-examined by the appellant meaning therefore that she gave evidence on oath. However, the basis upon which the learned magistrate arrived at that decision is not clear from the record. Further the record itself is silent as to whether really the complainant was sworn or not.

If the complainant's evidence is discarded as it should for want of voire dire examination then there is no other evidence linking the appellant crime. The remaining evidence on record does not amount to anything in law other than hearsay. Hearsay evidence, it is trite law is inadmissible evidence.

That being the case, the appellant's conviction and sentence cannot stand. Accordingly, I allow the appeal, quash the conviction and set aside the sentence of 20 years imposed on him. He will forthwith be released from prison custody, unless he is otherwise lawfully held.

***Dated and delivered at Nyeri this 16th day of September, 2009.***

**M.S.A. MAKHANDIA**

**JUDGE**