**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MERU**
**Criminal Appeal 228 of 2000**

**FREDRICK MUTUA IKIARA ……..……. APPELLANT**

**VERSUS**

**REPUBLIC …….. RESPONDENT**

***(An Appeal from a judgment of M.N. Omondi R.M.***

***delivered on 25.10.2000)***

**JUDGMENT**

This is an appeal from the conviction and sentence in Meru C.M. Criminal Case No. [.....] The appellant was charged with the offence of

"*Defilement of a girl contrary to section 145(1) of the Penal Code."*

In the alternative, he was charged with indecent assault on a female contrary to section 144(1) of the Penal Code. It will be noted that the alleged offence was committed before the amendments to sections 144 and 145 introduced by Act No. 5 of 2003. I will return to these provisions shortly.

The appellant was tried, convicted and sentenced to fifteen years imprisonment in the alternative charge. The learned trial magistrate found no evidence to support the main charge and acquitted the appellant. The appellant has challenged, in his grounds of appeal, the conviction only, although in his oral submissions he also challenged the sentence.

Before I embark on the consideration of these grounds I must, as the first appellate court, reconsider the evidence on record in order to arrive at my own independent conclusion.

I must add that the learned counsel for the respondent conceded the appeal. The main evidence against the appellant came from two young girls, PW1 (the complainant) and PW2. The two girls were together when the appellant, who is an uncle to the complainant, took her to his house. According to the complainant the appellant asked her to remove her clothes. She did so and the appellant then asked her to lie on his bed and again she complied. The appellant removed her pants and lay on top of her and:-

"……*defile me. I felt pain and started crying."*

The appellant released the complainant late in the night. She returned to their house. Her grandmother, PW3, B K returned home and noted she looked sad. On enquiring, the complainant recounted to her what had happened. The complainant was taken to the hospital and the incident reported to the sub-area.

The complainant was examined by Stephen Mukira, a clinical officer at Meru Hospital who was away attending a training course at Kenyatta National Hospital. The P3 form was produced by another clinical officer, PW5, Wilson Namu, on his behalf.

According to the evidence of the clinical officer there was no medical evidence of defilement, although the complainant appear, on examination, to have had previous defilement and her hymen had been broken.

PW2, another child confirmed that the appellant took the complainant to his house and locked themselves inside. When the complainant came out she did not tell PW2 what had happened to her. The appellant was subsequently arrested and accordingly charged.

In his sworn defence the appellant denied the charges and maintained that the only reason why PW3, BK and his brother, implicated him in this matter is because of land dispute.

The trial court considered the evidence adduced before it and found, as I have stated, that the same was not sufficient to found a conviction on the main charge of defilement. He, however, found that there was evidence in support of the charge of indecent assault.

This appeal challenges that finding on five grounds which on closer scrutiny amount to only one, namely that the conviction was against the weight of the evidence. The learned counsel for the respondent conceded the appeal on the basis that the evidence of both the complainant and the PW2, being children of tender years was not subjected to a *voir dire* examination; that the language of the trial was not disclosed and finally that part of the prosecution was conducted by an unqualified person.

The learned counsel, however, sought a retrial arguing that there is overwhelming evidence. The first observation I would like to make is with regard to the charge of defilement, which I have set out at the beginning of this judgment. It is simply stated in that charge:-

"***Defilement of a girl."***

That does not comply with section 145(1) of the Penal Code where the charge before the amendments alluded to earlier, was defilement of a girl under the age of fourteen years. That charge, therefore, did not disclose any offence known in law; save to add that the age of fourteen has since been enhanced to sixteen by Act No. 5 of 2003.

The doctor's report in the P3 form was categorical that there was no evidence of recent defilement, hence the correct finding by the learned trial magistrate that the appellant was not guilty of the charge of defilement.

The learned trial magistrate however, was persuaded that there was evidence of indecent assault. All PWI stated in her evidence was that:-

"*The accused told me to remove my clothes which I did and he told me to lie on his bed which I did. …….. The accused removed my pants and slept on top of me and defiled me. I felt pain and started crying. I did not check to see if there was blood on my clothes."*

It is stated in the particulars of the offence that the appellant indecently assaulted the complainant by touching her private part. From the evidence of the complainant that I have reproduced above there is no mention at all that the appellant touched her private part.

The appellant is alleged to have removed the complainant's pants, lay on top of her, defiled her and she felt pain. The learned trial magistrate having found that there was no defilement, that there was no penetration fell into grave error by concluding that there was indecent assault without evidence to support that conclusion.

Secondly, the learned trial magistrate being alive to the requirement of receiving evidence of children of tender years went about *voir dire* examination casually. For the complainant he only noted that she was eight (8) years of age and that after examination he found her to be intelligent to give sworn evidence. A similar approach was adopted in respect of PW2. Although PW2's age is not indicated, the trial court treated her as a child of tender years. PW2 testified that she was in class 1. Section 19(1) of the Oaths and Statutory Declarations Act provides the procedure of receiving evidence of children of tender years. The steps to be followed by the trial court has been laid down in numerous decisions, among them, Nyasani s/o Gichana V. R. (1958) EA 190 Oloo s/o Gai V. R. (1960) EA 86, Kinyua V. R. (2002) IKLR 256.

The law was summarized in **Nyasani** case (supra) as follows:-

"*It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of an oath, and if the finding of this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."*

There are, from the above, two steps to be followed by the trial court. It will ask itself; does the child witness understand the nature of an oath? To find out this, the court must conduct an investigation before the child testifies. If the court is satisfied that the child understands the nature of an oath then there is no need to conduct the second examination.

The child can be sworn at his stage and his/her evidence received. However, if the court is not persuaded after the first examination that the child understands the nature of an oath, the trial court must be satisfied that atleast the child, upon examination, is possessed of sufficient intelligence and understands the duty of speaking the truth. If the court is satisfied of the child's intelligence and that he/she understands the duty to speak the truth his/her evidence can nonetheless taken although not on oath.

In conducting a *voir dire* examination, specific questions aimed at establishing, in the first step, whether the child understands the nature of oath, must be asked by court. Eg whether the child goes to church or mosque or any other place of worship; whether the child knows the Bible or Quran; what the Bible/Quran or any other religion teaches about telling the truth; what the consequences of lying after swearing are, etc. In the second step the court will ask questions which seek to establish the intelligence of the child and the duty of telling the truth. The *voir dire* examination need not be elaborate so long as the same is focused. But it must be done and it must appear on record. The learned trial magistrate did not follow the foregoing steps and as a result fell into another error.

The learned trial magistrate having correctly directed himself that the evidence of the complainant required corroboration and that that corroboration could not come from the evidence of PW2 also being a child of tender years went ahead and held that:-

"*I would nonetheless warn myself of the dangers of convicting without corroboration but proceed to convict on the basis that PW1 is a child, she had no dispute with the accused. She knew the accused prior to this date, she positively identified the accused as her assailant and this*

*was the second of such incident by the accused. I will therefore find the accused guilty of the offence of indecent assault……… and convict him accordingly."*

With due respect to the learned magistrate he did not look for evidence to corroborate the evidence of PW1. Indeed there was none. The law when the trial was conducted was that where evidence of a child of tender years is admitted in the prosecution case that evidence must be corroborated. That is still the law under section 124 of the Evidence Act.

However, by Act No. 5 of 2003 a proviso has been introduced to section 124 to the effect that if the case involves a sexual offence and the only evidence is that of a child of tender years who is also the victim of the offence, the court can receive the evidence and proceed to convict on that evidence if it is satisfied for the reasons to be recorded that the child is telling the truth. Before the introduction of this law the learned magistrate was enjoined to convict on the evidence of PW1 and PW2 if there was corroboration.

For these reasons this appeal succeeds and is allowed accordingly. Having come to that decision I find no need to address the points raised by learned counsel for the respondent. The conviction is quashed and sentence set aside. The appellant shall be set at liberty forthwith unless for any lawful reason he is detained.

Dated and delivered at Meru this 15th day of October 2008.

**W. OUKO**

**JUDGE**