**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 114 OF 2018**

**BETWEEN**

**IBRAHIM HAMISI MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(*Being an appeal against the conviction and sentence passed by Hon. H. Nyakweba PM on 11.10.2018 in Mombasa CMC S.O No. 1605 of 2016*)

**JUDGMENT**

**Introduction.**

1. The appellant herein was charged with defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act No. 3 of 2006 and an alternative charge of committing an Indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the main count and the alternative count, and that the trial court sentenced him to serve twenty (20) years imprisonment, after taking into account his mitigation and treating him as a first offender.

3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the conviction and sentence vide Amended Grounds of Appeal filed in court on 19.10.2020, on the following grounds.

> 1. That the learned trial magistrate erred in law and fact by allowing the complainant to act herself as intermediary contravening section 31(3) of the S.O.A.
>
> 2. That the learned trial magistrate erred in law and fact by failing to subject (minor) to a voir dire examination contravening section 19 (1) of oaths and statutory declaration act.
>
> 3. That the learned trial magistrate erred in law and fact by failing to ask the appellant whether I had any question to put to the complainant PW 1 after her testimony in chief contravening section 208(3) of the CPC.
>
> 4. That the learned trial magistrate erred in law and fact by failing to find that the age of the comp**lainant was not proved beyond reasonable doubt.**

**SUBMISSION**

4. The Appellant filed his written submissions and relied on the same. On the Intermediary, the Appellant submitted that the evidence of PW 1 who acted as intermediary, was not admitted in accordance with the law as none of intermediary came to court to testify on behalf of the complainant minor who was aged 7 years old at the time of the offence. He further submitted that the intermediary was never summoned to appear and advice the court of vulnerabilities of the complainant.

5. The Appellant further submitted that the learned Hon. trial magistrate overlooked the legal issue by swearing the complainant minor as an

intermediary vulnerable who does not comprehend the meaning of an oath.

6. On the Voir dire examination, the Appellant submitted that the minor being a child aged seven (7) years at the time of the offence, ought to have been subjected to a voir dire examination as required by law. He further submitted that the trial court failed to conduct any "Voir dire" examination on the complainant PW 1 who was a minor aged 7 years old. The Appellant also submitted that the questions put to the child and her responses were not recorded.

7. On cross-examining the complainant, the Appellant submitted that the language used by the complainant during trial was unknown to the Appellant. That at the end of the end of the examination in chief, of the complainant PW 1 the trial court recorded "nil". The Appellant further submitted that from the record, he is not satisfied that at the end of the complainant's testimony, the court did ask him whether he had any questions to put to the complainant PW 1 and that the answer given upon such invitation, if any was made was recorded.

8. On the age of the complainant, the Appellant submitted that the charge sheet indicates that the complainant PW 1 is 7 years old at the time of the alleged offence, however the complainant in her testimony did not state her age to be 7 years. The Appellant goes further to submit that the complainant never stated her date of birth or the year she was born and that no parents or guardians were called to testify in court to prove the date of her birth.

9. The Appellant further submitted that failure to provide a document that states the year of birth of the victim, means that one vital element of the charge remains unproven thus a conviction would be unjustified.

10. On the harsh and excessive sentence, the Appellant submitted that the age of the complainant was not proved beyond reasonable doubt, the intermediary never came to testify in court to advice the court on the vulnerabilities of the Complainant and that he was not asked by the trial court whether he had any questions to put to the complainant. The Appellant further submitted that no voir dire examination was conducted to the complainant to test her intelligence, therefore 20 years is a long time to serve in a case where the issues are not clear.

11. Ms. Mwangeka learned Counsel for the D.P.P submitted the Appellant submitted that the evidence of PW 1 who acted as intermediary, was not admitted in accordance with the law that the grounds relied upon by the Appellant cannot hold and relied in the case of M.M V Republic (2014) eKLR where the Court of Appeal exhaustively outlined the law on the use of an intermediary. She further submitted that the court held that Section 33 of the Sexual Offences Act allows the trial court to rely on either the evidence of the surrounding circumstances, or under section 31 (4), evidence of an intermediary or both.

12. On Voir dire examination, Ms. Mwangeka submitted that the court of Appeal in Maripett Loonkomok v Republic (2016) eKLR has held that failure to conduct voir dire is not fatal.

13. On cross-examining the Complainant, Ms. Mwangeka, submitted that at page 20 of the record it is shown that the Appellant did not cross examine PW 1. She further submitted that the Appellant did not at any point rise the issue of being prejudiced by failing to cross-examine PW 1, thus the argument by the Appellant is an afterthought.

14. On the age of the complainant, Ms. Mwangeka submitted that the medical evidence that is the P3 form and the PRC form are instructive as to proof of age of the minor, the PRC form which is the primary examination document form for the survivors of sexual assault used in the filling of the P3 form as clinical notes, indicates that the minor was born on 01/09/2009, which means that at the time of the offence, the minor was 7 years old.

15. Ms. Mwangeka further submitted that the investigating officer PW5 stated that the P3 form assessed the age of the minor to be 7 years old.

16. On sentencing, under Section 8(1) as read with 8(2) of the Sexual Offences Act, Counsel submitted that the offence of defilement is punishable by life imprisonment, the Appellant was convicted to 20 years imprisonment. The sentence is therefore neither harsh nor excessive.

**DETERMINATION.**

17. This being the first Appellate Court, it is imperative that I must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including **Kiilu & Another V. Republic [2005] 1 KLR 174** where the Court of Appeal held that:

> **"An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st Appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. ….**

18. The Appellant seeks to challenge his conviction and sentence for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act No. 3 of 2006. The section read;

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**

**(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

**Intermediary**

19. Section 2 of the sexual offences Act, defines an intermediary to mean:

> **"…..a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."**

20. The use of an intermediary in evidence is fairly distinctive in our jurisprudence. It was introduced upon the enactment of the sexual offences Act, 2006. The same is also provided for under Article 50(7) of the Constitution which protects fair trial provides thus:

***In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.***

21. I have perused the record and I have seen that indeed the child was declared a vulnerable witness on account of age and trauma and was therefore required to testify through an intermediary. An intermediary was thereafter appointed in line with the provisions of Section 31(3) and (5) of the Sexual Offences Act.

22. The said sections provides that:

> ***(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness……..***
>
> ***(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.***

23. The procedure for conducting trial through an intermediary was dealt with extensively by the Court of Appeal in **M. M. vs. Republic [2014] eKLR** and expressed itself as hereunder:

> **"It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings…….**
>
> **We have seen that in Article 50 (7) of the Constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties."**

24. Looking at the facts the Appeal before us alongside the facts of the aforementioned case, it is very clear that the complainant herein being a child of tender years was a vulnerable witness and there was therefore need for the child to testify through the intermediary. It is also clear that all the provisions set down by the law under section 31 of the Sexual Offences Act were adhered to.

25. The submissions by the Appellant that the intermediary did not come to testify are unfounded since an intermediary does not come to court to tender in his or her own independent testimony but only to be used as a medium and/or voice by the complainant when testifying.

**Voir dire examination**.

26. Voir dire examination is commonly conducted on complainants who are of tender years before they testify, so that the court can determine whether or not the minor understands the nature of an oath and whether the testimony they give is admissible. In the Appeal before me, the complainant was said to be a girl of 7 years old therefore a child of tender years.

27. On perusal of the record, I find that the trial magistrate did not conduct voir dire examination before taking her testimony. I have also found that the minor testified through an intermediary who had been appointed by court since the minor had been declared a vulnerable witness and also the intermediary was sworn in before testifying.

28. It is therefore clear from the record that the trial magistrate did not conduct a voir dire examination on the minor on the belief that the minor was testifying through a medium who was under oath, therefore the voir dire examination was not necessary.

29. In the case of **Maripett Loonkomok v Republic [2016] eKLR,** the Court of Appeal sitting at Mombasa held that:

> **"It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;**
>
> > ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."***

30. It is therefore my considered view that the trial before the trial court was not spoilt by the failure to conduct voir dire examination by the trial magistrate. So that even without the testimony of the complainant, the offence of defilement was proved especially with the medical evidence and since the PW 3 testified that he caught him on the act. Consequently the Appellant's Appeal fails on this ground.

**Cross-examination of the complainant.**

31. On the issue of whether the Appellant was afforded the chance to cross-examine the complainant, I find that from the record, it is indicated that he didn't ask any questions when given the opportunity to do so. The appellant cross-examined other witnesses and the answers to his questions are indicated throughout the proceedings and even in his defence he didn't complain that he was not allowed to cross-examine the complainant. It is noteworthy that the appellant had the knowledge to cross-examine all the other prosecution witnesses even without the trial magistrate first inquiring whether or not he wished to do so. Therefore the Appellant's Appeal fails on this ground.

**Age of the Complainant.**

32. In the case of **Hadson Ali Mwachongo Vs. Republic [2016] eKLR, the Mombasa** Court held that:

> **"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim…"**

33. The minor during examination-in-chief testified that she was seven years old. The Appellant in his submissions argued that to prove age, one would need a birth certificate, baptismal card, health vaccination card, school records or other document which states the year of birth of the victim.

34. I have perused the record and found that the PRC form which was produced as Prosecution Exhibit 3, indicates that the minor was born on 01.09.2009. Looking at the P3 form it indicates that the minor was 7 years at the time of the offence. I therefore agree with the submissions by Ms. Mwangeka as it was held in the case of **Thomas Mwambu Wenyi v Republic [2017] eKLR** that age is provable by medical evidence or other cogent evidence. I also agree with the finding of the trial magistrate as to age on page 4 of the judgment. The Age of the Complainant was therefore properly proved.

35. From the foregoing, I find that the three ingredients for the offence of defilement were proved beyond reasonable doubt. I will not therefore interfere with conviction by the trial court. Appeal on conviction is therefore dismissed.

36. As to whether the appellant sentence was harsh and excessive, I note that the appellant was charged for **Defilement** contrary to **Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006**, which provides as follows:

> **Section 8. (1) of the Sexual Offences Act No. 3 of 2006** states;
>
> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

While **Section 8. (3) of the Sexual Offences Act No. 3 of 2006** states:

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

37. Having been convicted for the offence of defilement, the trial Court considered the Appellant's mitigation that he lost his father about two years ago, he was the only one assisting his mother out of his earnings as a casual laborer and that there is a sickly aunt who also depends on him as well as his aged grandmother. The trial Court after considering the Appellant's mitigation noted that the offence that the accused person committed is serious and was committed against an innocent child of tender years. The trial Court went ahead to note that a punitive sentence will be necessary so to act as a determent to other potential offenders and after considering the age of the accused and the period he had already spent in custody, the trial court sentenced him to serve a period of 20 years imprisonment.

38. Sentencing is a discretion of the trial court. In **Bernard Kimani Gacheru –Vs- Republic (2002) eKLR**, the Court of Appeal stated that:-

> **"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even**

**if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.**

39. Bearing in mind that the offence of defilement contrary to section 8(1) as read with section 8(2) carries a sentence of life imprisonment, I find that taking everything into consideration the sentence of imprisonment for twenty years was justified in the circumstances of this case save that, since appellant had been in remand custody since 10.8.2016. The same is upheld and the appeal is dismissed in its entirety. The sentence should run from 10.8.2016.

It is so ordered.

Right of appeal in 14 days.

**Dated, Signed and Delivered, in open court this 5th day of February, 2021**

**……**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**