**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 41 OF 2019**

**ERNEST KIMATHI.....................................................................APPELLANT**

**VERSUS**

**REPUBLIC ..............................................................................RESPONDENT**

**(Being an appeal from the original conviction and sentence by Hon. J.Irura PM in Nkubu S.O No. 5 of 2018 delivered on 18/02/2019)**

**JUDGMENT**

1. **ERNEST KIMATHI ('the appellant')** was charged in three different counts with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3) of the Sexual Offences Act No. 3 of 2006** by which it was alleged that on 28th and 29th January 2018 at [particulars withheld] Market in Imenti South Sub-County within Meru County, he did commit acts which caused penetration with his genital organ (penis) into the genitals organ (vagina) of **YM, BK and YK ("the complainants")** three children all aged 14 years.

2. He also faced three alternative counts of committing indecent acts with the three children contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of those counts alleged that on the same dates and place, he intentionally touched the breast and vagina of the three, **YM, BK** and **YK** children all aged 14 years.

3. He denied the charges, faced the prosecution where a total of eight witnesses testified with the appellant offering a sworn statement but without any witnesses. In the end he was convicted on the three main counts of defilement and sentenced to 20 years' imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 6 grounds of appeal which I have coalesced into 5 as follows;

> *a. The trial court erred in law and fact by failing to note that the complainants were not taken through voire dire to examination, to know if they were in position to know the meaning of oath.*
>
> *b. The trial court erred in law and fact by failing to note that evidence of broken hymen is not proof of defilement.*
>
> *c. The learned trial magistrate erred in law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting testimonies.*
>
> *d. The trial court erred in law and fact by failing to note that the investigation was shoddy, because key witnesses were not called to testify.*
>
> *e. The trial court erred in law and fact by failing to observe that the mandatory sentence of 20 years' imprisonment meted against the appellant fails to conform the tenet of fair trial that accrues to the accused under Article 25(c) of the Constitution.*

5. The appellant filed his submissions on 21/6/2021 in which he avers that, the complainants being children of 14 years and below ought to have their competency to give evidence tested by the trial court through voire dire examination, as founded in Section 125 (1) of the Evidence Act and Section 19(1) of the Oaths and Statutory Declarations Act, their evidence was never so tested hence the evidence was not properly received. He beseeched the court to note that, hymen may be perforated in several instances other than defilement. He faulted the clinician for failing to indicate if the hymen was freshly torn or not. He submitted that no DNA test was conducted to prove that the alleged spermatozoa present belonged to him. He alluded to various inconsistencies in the testimonies by the prosecution witnesses. He termed the sentence meted upon him as unfair and disproportionate as the complainants behaved like adults. He urged the court to quash the conviction, set aside the sentence and set him at liberty. He relied on **JGK v Republic [2015] eKLR, Gamaldene Abdi Abdiraham & Another v Republic [2013] eKLR, Patrick Kathurima v Republic [2015] eKLR, PKW v Republic [2012] eKLR, Martin Charo v Republic [2016]eKLR and Francis Karioko Muruatetu & Another V Republic** in support of his propositions in the submissions that a child of tender years' evidence should only be taken after viore dire is administered and that evidence received otherwise cannot support a conviction and further that contradictory and conflicting evidence never grounds conviction.

6. For the prosecution, it was submitted that it had proven its case beyond reasonable doubt, where the complainants' testimonies that they were minors were corroborated their mothers through child health cards. The complainants' corroborative testimonies were consistent which was unchallenged by the appellant. It relied on **Charles Wamukoya Karani V Republic Criminal Appeal No. 72 of 2013,** in support of its submissions on what ingredients constitute the offence of defilement.

**Review of the evidence at trial**

7. The prosecution in advancing its case against the appellant called 8 witnesses. **PW1, YM,** the complainant in count I, gave sworn testimony that she was a class 7 pupil at [**particulars withheld**] born on 15/8/2004. She knew the appellant who was her friend since December 2017 to January 2018, as he used to work near her home as a security officer. On the material day she was at Esther Wangui's home at Mitunguu when she met with PW2 and PW3 outside pillars bar. They proceeded to the appellant's house, a one room with a bed, TV and some utensils. The appellant left them in the house when he was called to work. When he came back at 9.00 pm, they decided it was too late to go home and agreed to spend the night. They then all had sexual inter course in turns with the appellant. At 5.00 am PW2 and PW3 went home while she went to Wangui's home. She later learnt from PW3 that PW2 had been beaten by her mother for not sleeping at home. PW2 and her mother then came for PW3 and PW1 and they were all taken to Mitunguu police station to record statements, and later to hospital at Kanyakine where her P3 form was filled. The appellant was subsequently arrested at his place of work. She added that she knew the appellant prior to the incident but had never been to his house before the fateful day. Upon cross examination the witness told the court that that there were some women in the plot and that the appellant put on a condom while having sex with her.

8. **PW2, BM,** the complainant in count II, gave sworn testimony that she was a class 7 pupil at [**particulars withheld**] aged 14 years old. She knew the appellant having met him through PW1 and that on the fateful day, PW1 requested them to take her to Kim's place (appellant). They found him at his house which did not have a bed but a mattress. He was then called to his work place but came back at around 9.00 pm. PW1's home was far from the appellant's house hence the here girls could not go back home and so they decided to spend the night at the house of the appellant hence they continued watching TV till they slept.

9. In the night, the appellant had sexual intercourse with PW1, then with her and lastly with PW3. After they all had sex, they slept and at around 5.00 am, they all departed and went home. They later went in search of PW1 and PW3 in the company of her parents. After they had been examined at [particulars withheld], they made a report at the police station. She denied the existence of any grudge between the appellant and her. During cross-examination, she admitted that she had met the appellant thrice prior to the incident. She also admitted that the appellant slept in his house with them on the material day.

10. **PW3** was **YK,** the complainant in count III who gave sworn testimony that she was a student at [**particulars withheld**] born in 2004. She knew the appellant having met him at PW1's house about 4 times. On the fateful day, PW2 came to her house and requested her to accompany her to the barber at [particulars withheld]. Soon thereafter, PW1 asked them to go to visit her friend, one Kim, whom they found in his home. The appellant left for work and returned at around 9:00pm, only to find them still at his house. As it was at night, they were unable to go home and PW1 suggested they spend the night. At around 11:00pm the appellant started touching PW1 and had intercourse with her, then with PW2 and later with her. At 4:00am, the appellant woke them up and they had a second round of sexual intercourse again. At 5:00am, they went home with PW2. When she got home, she remembered she had left PW1 with her jacket and went back to the appellant's house to retrieve. When she did not find the appellant at his house, she and PW1 decided to go in search of her jacket only to meet with her mother. They were taken to Mitunguu police station then later to Kanyakine Hospital for examination. During cross examination, she affirmed that she used to see the appellant at PW1's home. She further confirmed that the appellant had sexual intercourse with them in turns.

11. **PW4 Susan Kinya,** PW1's mother testified that she knew the appellant as neighbor at her residence in [particulars withheld] and that on 26/1/2018, she had a difference with her daughter aged 14 years, having been born on 15/8/2004 and in class 7 over the missing of some Kshs 500 which she suspected the daughter to have taken when so confronted the girl left through the back door and was not seen, despite searches, till Monday the 29.01.2018 when she received a call to go to Mitunguu police station and found the girl there recording a statement with the police. her daughter left using a back door. She searched for her without any success forcing her to continue the search the next day. On Monday, she was informed through the phone by PW6 to go to Mitunguu police station. She found her daughter, PW2 and PW3 there and was told by PW1 that they had spent the night at the appellant's house where he had sexual intercourse with all of them. The complainants identified the appellant as the man who had defiled them and he was arrested. During cross examination, she stated that she had on two occasions found the appellant at her house and that she did not hate the appellant.

12. **PW5 CW,** PW2's mother, stated that her daughter was born on 7/7/2003 and was a pupil at an identified primary school. On 28/1/2018, she returned home from work only to find her daughter missing. The following morning, her daughter returned home and informed her that they had spent the night at the appellant's house. PW2 stated that the appellant had sexual intercourse with them in turns. PW4 and PW5 then found PW1 and PW3 and escorted all of them to the police station. After they had taken the complainants to the hospital, the appellant was subsequently arrested. During cross examination, she stated that PW2 took them to the appellant's house.

13. **PW6, PNM,** mother to PW3, testified that her daughter was in class 7 having been born on 25/4/2004. On 28/1/2018 her daughter never came home till the following day when, she and PW4 were informed by PW2 that they had slept at the appellant's house. PW2 proceeded to take them to the appellant's house but he was not there. They later met with PW1 and PW3 who also confirmed to having slept at the appellant's house and that the appellant had sexual intercourse with the three of them. The parents escorted the girls to the hospital having made a report at the station. During cross examination, she reiterated that the complainants had informed them that they had spent the night with the appellant in his house during which time they had sexual intercourse and that he had no reason to frame the appellant.

14. **PW7, CPL Chepkoech Caroline,** a police officer attached at Mitunguu police station gave evidence having received and booked a report by two women in the company of three girls, being PW1, 2 & 3, to the effect that the girls had not spent the previous night at home but had been with the appellant in his house on the basis that he was a friend to PW1. She produced the birth certificate for PW2 and Clinic Cards for PW1 and PW3. During cross examination, she confirmed that she did not visit the appellant's house, although it was not far from the station.

15. **PW8 Seberina Kaimathiri**, a clinical officer attached to Kanyakine Sub County Hospital, produced the P3 forms, treatment notes and

PRC Forms in respect of all the complainants. She said that in examining PW1, her genitalia had no bruises but her hymen was absent and that there was a whitish discharge from the vagina. There was also presence of spermatozoa, pus cells and epithelial cells. She opined that the presence of spermatozoa and broken hymen were suggestive of penetrative sexual intercourse. She assessed the degree of injury as grievous harm due the psychological torture. On examining PW3, she had no bruises on her genitalia but the hymen was missing and there was a whitish discharge, pus cells, red blood cells, yeast cells but no spermatozoa. The broken hymen was suggestive of penetrative sexual intercourse. On examining PW2, she had no bruises on her genitalia though it was reddish and tender and the hymen was missing. She opined that the presence of spermatozoa, reddish vulva and broken hymen was suggestive of penetrative sexual intercourse. She produced the P3 forms, PRC forms and treatment notes for all the complainants. On cross examination, she stated that the hymen was broken on all the complainants, and she found spermatozoa on only 2 complainants who were defiled on 3 occasions during one night.

16. In his defence, the appellant stated that he was at his place of work the whole day, and only went home to take a shower. Although he used to see PW1, he denied having a love affair or any relationship with any of the complainants.

17. In determining this appeal, this court being a first appellate court takes into account the principles laid down in the case of ***Okeno v R (1972) EA 32*** where the Court of Appeal for Eastern Africa stated that:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings 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, see (Peters V Sunday Post 1978) E.A. 424)."**

18. The charges before the court having been on the offence of defilement, the onus upon the prosecution was to prove the ages of the complainants, prove the fact of penetration and connect the appellant with the acts complained about beyond reasonable doubt. In seeking to satisfy itself if the decision needs to be upheld or reversed, the court has identified the following questions to arise for its determination: -

a) What is the consequence of a trial court failing to conduct voir dire?

b) Was the age of PW1, 2&3 proved to be that of minors?

c) Was penetration of the three girls proved?

d) Was the appellant proved to have been the perpetrator?

19. In this appeal, the first ground of appeal faults the trial court for receiving the evidence of minor without conducting vior dire as mandated by the provisions of section 125(1) of the Evidence Act as read with section 19(1) of the Oaths and Statutory Declarations Act. The grounds of appeal and the submission take the very firm position that evidence of a child of tender years, and it is contended that a child tender year include a child aged 14 years, taken without conducting vior dire, is unsafe to support and sustain a conviction. The question is whether failure to conduct voir dire before taking the evidence of the complainants vitiated the trial by rendering the evidence of the minors of no probative value.

20. It remains trite that the testimony of children, be taken after voir dire examination is conducted to enable the court satisfy itself that the children are conscious of the truth. It is only after the examination is conducted that the court can decide whether the child witness is possessed of sufficient intelligent, understands the need to tell the truth, the consequences of not telling the truth and if one understands the nature of an oath. It also affords the court the opportunity to gauge and decides if the child gives evidence on oath or otherwise.

21. Here, it is clear that all the complainants, PW 1, 2 & 3 gave sworn evidence despite the fact that voir dire was not conducted. **Section 19(1) of the Oaths and Statutory Declarations Act** stipulates that;

> **"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 is 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 section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."**

22. The importance of conducting a *voir dire* examination on minors cannot be gainsaid. However, the provision of Cap 15, reproduced above, places the duty upon the trial court to form an opinion on how to receive the evidence of children. The need to conduct vior dire is informed by the requirement of the statute that the court forms an opinion that such person, understand the nature of an oath, and even where the person does not understand the nature of an oath, his evidence may be received, though not given upon oath.

23. In ***Maripett Loonkomok v Republic [2016] eKLR*** the Court of Appeal stated;

> **"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…i<u>n appropriate cases 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…</u>**

**O<u>n the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct *voir dire* examination. The complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration</u>**

24. I get the direction from the above decision that failure to conduct vior dire alone vitiates not the trial if the totality of the evidence is sufficient to sustain the resultant conviction. Put in the context of this matter, the evidence by the three victims on their whereabouts on the fateful night was indeed cogent. That they spent in the house of the appellant and in his presence was not rebutted. Equally, the evidence that the appellant engaged in sexual intercourse with the three was consistent and invites no reasonable doubt. In whole I find that the failure to conduct vior dire, notwithstanding, the entire evidence on record was sufficient to prove the case against the appellant and that the conviction entered was safe and not amenable to being upset.

25. On the sentence, however, I note that the trial court meted out a global sentence without assigning to any of the counts on which the conviction was entered. The charges even if committed at the same time and place were separate and distinct and indeed attracted separate and distinct consequences by way of penalties. In meting out a global sentence as he did the trial court fell into an error. I find persuasion from the decision in n in **JSO v Republic [2019] eKLR** where the court said: -

**"It is a principle of sentencing that where an accused person is charged with two or more counts each count has to attract a separate sentence. The trial magistrate in the instant case imposed a sentence of 3 years without specifying the particular count it was meant for. This was an error on the part of the trial court.'**

26. Here the trial court having convicted on the three main counts, it was obligated by law to impose a sentence on each then decide whether the same was to run concurrently or consecutively. In failing to do so there was an error this court is obligated to correct by setting aside such sentence.

27. Having set aside the sentence, it now becomes the duty of the court to consider the appropriate sentence to make. In doing so the court takes cognizance that the trial court felt obligated to mete out the least mandatory sentence. Such an approach is now frowned upon as going against the constitutionally sanctioned independence of the court in sentencing. The court also did not give to the appellant benefit of the period he served in custody between 31.01.2018 and 23.4.2018 when he was released on bond. Those two reasons justify the court right to interfere with the sentence. In so interfering, I appreciate the fact that the offence of defilement is quite rampant in this region and there is public interest that such be discouraged. However, the age and circumstances of the appellant also needs being taken into account as a young man with a young family. Having taken such into account, I do substitute the jail term of twenty years with one for 10 years on each count. The sentences shall run concurrently and be computed from the date of conviction.

**DATED, SIGNED AND DELIVERED AT MERU, VIRTUALLY BY MS TEAMS, THIS 17TH DAY OF SEPTEMBER 2021**

**PATRICK J O OTIENO**

**JUDGE**

**In the presence of**

Appellant in person

Mr. Maina for the prosecution

Patrick J O Otieno

Judge