REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 5 OF 2017

WALTER KIPCHIRCHIR TOROITICH.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Eldoret (Hon. M. Njage, SRM) delivered on the 29th day of April 2015 in Eldoret Chief Magistrate's Court Criminal Case No.5313 of 2013)

JUDGMENT

[1] The Appellant herein, **Walter Kipchirchir Toroitich**, filed this appeal on **26 November 2017** from the conviction and sentence passed against him by the Senior Resident Magistrate**, Eldoret** on **29 April 2015**. He had been initially charged 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**. The particulars were that on the **18th day of November 2013** in Chemoiben Location of the Keiyo South District within Elgeyo Marakwet County, he unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of **SJM,** a girl then aged 13 years.

[2] In the alternative, the Appellant was charged with the offence of **Indecent Act with a Child,** contrary to **Section 11(1)** of the **Sexual Offences Act.** It was alleged that on the **18th day of November 2013** in Chemoiben Location of the Keiyo South District within Elgeyo Marakwet County, he intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of **SJM,** a girl then aged 13 years.

[3] The Main Charge was thereafter amended on **29 May 2014** to Defilement of an imbecile contrary to **Section 7** of the **Sexual Offences Act,** whereupon the matter proceeded for trial, the Appellant having denied the allegations. In a considered Judgment delivered thereafter on the **29 April 2015**, the Learned Trial Magistrate found the Appellant guilty of the Alternative Charge, convicted him thereof and sentenced him to 10 years' imprisonment. Being aggrieved by the sentence imposed on him, the Appellant preferred this appeal on the following grounds:

> **[a]** That he is a first offender and is remorseful for the offence;
>
> **[b]** That the offence emanated from the influence of alcohol and bad company which he promised to shun:
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> **[c]** That the sentence of 10 years' imprisonment may have a negative impact on his future since he wished to pursue his studies;
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> **[d]** That the trial court erred both in law and fact by convicting him without satisfying itself that penetration had been proved beyond reasonable doubt;
>
> **[e]** That the trial court erred both in law and fact by convicting him without giving consideration to his defence.

In the premises, the Appellant prayed that his appeal be allowed and that the sentence be reduced or replaced with a non-custodial or other lesser sentence as the Court may deem appropriate.

[4] When the appeal came up for hearing on **5 September 2018**, it became manifest from the Appellant's submissions that he was intent on attacking not only the sentence, but also the soundness of his conviction. Accordingly, leave was granted for him to file Amended Petition and Grounds of Appeal; which he did on **19 September 2018**. The appeal was therefore urged on the basis of the following Grounds of Appeal:

> **[a]** That the Trial Magistrate erred in both law and fact by convicting him without conducting a *voir dire* examination on the Complainant;

[b] That the Trial Magistrate erred in law by convicting him and sentencing him to serve 10 years imprisonment without considering that he was a child at the time; and ought to have been treated in accordance with the relevant provisions of the **Children Act;**

[c] That the Trial Magistrate erred in both law and fact by convicting him without considering the effect of the variance between the name of the Complainant in the Charge Sheet and in the evidence adduced by the Prosecution;

[d] That the Trial Magistrate erred in both law and fact by convicting him on the evidence of identification which was not free from error;

[e] That the Trial Magistrate erred in both law and fact by convicting him while relying on unauthenticated documents produced by the Prosecution.

[5] The Appellant prosecuted his appeal by way of written submissions which he highlighted on **29 November 2018.** He argued that the omission by the Trial Magistrate to conduct *voir dire* as required by the law before taking the evidence of the Complainant was fatal to the Prosecution Case; and therefore that no conviction ought to have been founded on that evidence. He relied on **Kinyua vs. Republic [2002] 1 KLR 256; Peter Karigi Kuure, Criminal Appeal No. 77 of 1982; Johnson Nyoike Muiruri vs. Republic [1982-88] 1 KAR 150** and **Joseph Karanja vs. Republic, Criminal Appeal No. 157 of 2003.**

[6] The Appellant reiterated his argument that he was under 18 years of age at the time of the alleged offence; and that since **PW2**, who examined him, confirmed this fact to the trial court, he ought to have been treated as a child for purposes of his trial and sentence, granted the provisions of the **Children Act**, especially **Section 191** thereof. He likewise pointed out that the lower court ignored the variance between the Charge Sheet and the evidence adduced before it in connection with the exact name of the Complainant. He pointed out that in the Charge Sheet at page 3 of the Record of Appeal, the name of the Complainant is stated as **"Shalom"** whereas in the proceedings as **"Sharon".** He posited that this variance ought to have led the trial court to the conclusion that the names were in reference to two different people; the prosecution having failed to rectify the anomaly by way of amendment of Charge.

[7] In respect of his 4th Ground of Appeal, the Appellant submitted that the Child Health Card that was exhibited in proof of the Complainant's age only specified one name of the Complainant and not the full name. He further observed that the document is not stamped by the relevant health facility and therefore is a forgery and should be declared as such. Lastly, it was the submission of the Appellant that since the incident is alleged to have occurred at night, the lower court was under obligation to ensure that his identification was free from error. He accordingly prayed that his appeal be allowed, the conviction quashed and the sentence set aside.

[8] On behalf of the State, **Ms. Mumu** opposed the appeal. Her submission was that the Prosecution's Case was proved beyond reasonable doubt through the 4 witnesses who testified before the lower court. She rehashed that evidence and submitted that the father of the minor, **PW1,** testified as to the age of the minor and produced her Certificate of Birth as an exhibit; to show that she was aged 13 years at the time of the offence. She further submitted that credible evidence was also availed by **PW1** as to the Complainant's mental condition, which fact was corroborated by the evidence of **Dr. Yatich (PW2).**

[9] On penetration, **Ms. Mumu** submitted that, in addition to the Complainant's evidence in this regard, **PW2** testified that she examined the minor and found her with hymenal tears and a whitish vaginal discharge; and that because of the injuries noted in the minor's genitalia, **PW2** concluded that she had been defiled. She further pointed out that the Complainant was able to positively identify the Appellant; noting that she had mentioned his name at the first opportunity. Accordingly, **Ms. Mumu** urged the Court to find that the lower court rightly rejected the Appellant's defence as a mere denial. She added that the Appellant was over 18 years at the time of his conviction and hence was accorded the proper treatment by the trial court. Thus, **Ms. Mumu** urged the Court to dismiss the appeal in its entirety.

[10] The Court has carefully considered the Appellant's Grounds of Appeal, the submissions made by either side, as well as the record of the lower court. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. This principle was aptly expressed in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 conclusion; 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..."**

[11] What, then, was the evidence upon which the Appellant was convicted? The first Prosecution Witness was the Complainant's father **(PW1).** He told the lower court that the Complainant is his 7th born, having been born on **12 June 2000** and that she was 13 years old in **2013** when the offence took place. He produced the Complainant's Child Health Card as an exhibit to corroborate his evidence as to the minor's date of birth. Regarding the night of **17 November 2013**, **PW1** testified that he was asleep when his wife brought it to his attention that the Complainant, who was then sleeping in their detached kitchen, was crying. That on going out towards the kitchen to find out what the matter was, he saw a man dash out of the kitchen. He went after him but was unable to catch up with him. **PW1** added that on asking the Complainant who the person was, she told them it was their neighbour, **Kipchirchir**, and that he had defiled her. It was also the evidence of **PW1** that, the culprit had left his pair of brown sandals in the kitchen as he fled. **PW1** told the lower court that, since the named offender was a neighbour, he immediately had the matter reported to the village elder and thereafter proceeded to the Appellant's home and had him arrested.

[12] PW2 confirmed that, from the examination conducted by **Dr. Embenzi,** the Complainant is epileptic and has slight mental retardation; and that, on examination of her genitalia, the Complainant was found with fresh tears on the hymen as well as a whitish vaginal discharge. The Doctor's conclusion was that the Complainant had been subjected to vaginal intercourse. **PW2** produced the P3 in respect of the

Complainant as an exhibit before the lower court.

[13] The Complainant testified before the lower court on **10 December 2014** as **PW3**. Her evidence was that, on the **17 November 2013** she was sleeping in her parent's kitchen. That she was alone when she suddenly felt somebody caressing her and undressing her. Out of shock she screamed for her parents' help but was threatened by her assailant who proceeded to defile her. Her mother, who heard her scream, went to the kitchen and found the Appellant lying on her, but that he quickly got up and escaped through the window. It was further her testimony that she immediately mentioned the name of the Appellant to her parents who had the matter reported to the village elder and had the Appellant arrested.

[14] PW4, PC Obadiah Ngige, was the investigating officer. The Appellant was handed over to him on **18 November 2013** by the Complainant's father on allegations of having defiled the Complainant. He stated that the Complainant's father also handed over to him a pair of brown shoes which the Appellant left at the scene of the incident, as well as the Complainant's Child Health Card. He interviewed the witnesses and thereafter issued the Complainant with a P3 Form. The P3 Form was filled and returned. He confirmed that the Appellant was also escorted to Moi Teaching and Referral Hospital for examination and had a P3 Form filled in that regard.

[15] On his part, the Appellant told the lower court that he was at **Kapseikur Centre** at 8.00 p.m. on the night of **18 November 2013** when he was arrested by the Chief and their Village Elder. That he was then handed over to the Police who took him to **Kaptagat Police Station** where he was beaten up to accept the allegations of defilement. He denied those allegations and told the lower court that he first saw the Complainant in court and that he did not know her or her parents prior to his arrest. In effect, the Appellant raised an *alibi*, contending that he was already in custody by the time the offence is alleged to have occurred.

[16] The trial court considered the evidence tendered before it, including the Appellant's alibi defence. It found the Appellant guilty of the Alternative Count and convicted him thereof, after finding that the Substantive Charge had not been proved.

[17] In any case of defilement, the Prosecution is under duty to prove the following essential ingredients:

> **[a]** That the Complainant was, at the material time, a child aged 13 years;
>
> **[b]** That there was subjected to penetration involving her genital organ.
>
> **[c]** That the penetration was perpetrated by the person accused.

In this case, the Prosecution had the additional burden of demonstrating that the Complainant is indeed a person with mental disability for purposes of **Section 7** of the **Sexual Offences Act**, and that this fact was well within the knowledge of the Appellant before and at the time of commission of the offence.

[a] <u>On the age of the Complainant:</u>

[18] The Complainant's age was testified to by her father, **PW1**. He told the lower court that the minor was born on **12 June 2000**. He also produced the Child Health Card of the Complainant to augment his evidence. It is manifest therefore that sufficient evidence was placed before the lower court, which evidence was entirely uncontroverted, that the Complainant was born on **12 June 2000.** She was therefore aged 13 years and 5 months as at **18 November 2013,** when the incident complained of took place.

[19] It is now trite that the months following the last birthday, if any, do not count for purposes of determining the age of a child so long as they are less than one year. This was well explained by the Court of Appeal in **<u>Hadson Ali Mwachongo vs. Republic [2016] eKLR</u>** as hereunder:

> **"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old . That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year."**

[20] I note that in his written submissions the Appellant challenged the authenticity of the Child Health Card produced before the lower court contending that it was a forgery, for the reasons that it was not certified; and that it did not have the stamp impression of the health facility that issued it. However, a consideration of the lower court record shows that no such allegations were made before the lower court by the Appellant either in cross-examination or in his sworn statement of defence, to enable the court make a determination on whether or not the document was a forgery. Hence, on the evidence that was before it, the lower court cannot be faulted for finding that the age of the Complainant had been proved to be 13 years at the material time the offence was committed. It is my finding therefore that credible evidence was adduced before the lower court to prove beyond reasonable doubt that the Complainant was a child for purposes of **Sections 2** of the **Sexual Offences Act**, as read with **Section 2** of the **Children Act, No. 8 of 2001**.

[b] <u>On whether the Complainant was subjected to indecent contact involving her genital organ:</u>

[21] In this regard, the Complainant testified that on the **17 November 2013** she was sleeping in her parent's kitchen when the Appellant gained access thereto and defiled her. She explained that she was all alone in the kitchen; and that she suddenly felt somebody caressing and undressing her. She screamed out of fright but was threatened by her assailant who proceeded to cause penetration of her genital organ with his genital organ. Her parents took immediate action and had the matter reported to the Village Elder and thereafter to the Police. The report was confirmed by **PW4**, a Police Officer then based at **Kaptagat Police Station.**

[22] More importantly, **Dr. Yatich (PW2)** confirmed that, on examination of her genitalia, the Complainant was found with fresh tears on the hymen as well as a whitish vaginal discharge, leading to the conclusion that the Complainant had been subjected to vaginal intercourse. She also confirmed that from the examination conducted by her colleague, **Dr. Embenzi**, the Complainant was confirmed to be epileptic, with slight mental retardation. **PW2** produced the P3 in respect of the Complainant as an exhibit before the lower court.

[23] Clearly, there was sufficient evidence to prove penetration as well as the Complainant's mental condition, noting that the Appellant raised an *alibi* and was therefore not in a position to refute the Prosecution's evidence in respect of the occurrence. However, the court was unable to record a conviction in respect of the Main Charge for the reason that the it was laid under **Section 7** of the **Sexual Offences Act**; had not been established to the requisite standard. That provision of the law states as follows:

> **"A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."**

[24] In the instant matter, the Complainant was not a third party witness to the crime but the victim. Clearly, therefore, the particulars set out in support of the Main Charge fell short of fully setting out the ingredients of the offence envisaged by **Section 7** of the **Sexual Offences Act**. In the same vein, the facts and evidence presented before the lower court did not support the offence envisaged in the Main Count. Nevertheless, the evidence proved beyond reasonable doubt that there was indecent contact between the assailant's genital organ and the Complainant's genital organ. Hence, the conviction in respect of the alternative count was based on sound reasoning and evidence.

[25] It is instructive to note that, for purposes of **Section 11(1)** of the **Sexual Offences Act**, **"Indecent act"** is defined in **Section 2** of the Act to mean:

> **"...an unlawful intentional act which causes-**
>
> **(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**
>
> **(b) exposure or display of any pornographic material to any person against his or her will."**

It was therefore sufficient that there was an unlawful intentional contact between the Appellant's genital organ and the Complainant's genital organ.

[c] <u>On whether the penetration of the Complainant was perpetrated by the Appellant</u>:

[26] There is no dispute that this was a case of identification at night by a single witness, namely **PW3**. There is similarly no question that such evidence requires careful scrutiny because mistakes can be made, albeit in honesty. That is why, in **<u>R. vs. Turnbull & Others [1973] 3 AllER 549,</u>** it was held that:

> **"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"**

[27] Similarly, in **<u>Wamunga vs. Republic [1989] KLR 426</u>**, the same principle was restated thus:

> **"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."**

[28] The Complainant's evidence was that her screams for help attracted the attention of her mother who, on going to the kitchen, found the Appellant lying on her, but that he quickly got up and escaped through the window. She added that she had a torch with her which enabled her to see the Appellant before he made his escape. It was further her testimony that she immediately mentioned the name of the Appellant to her parents who had the matter reported to the village elder and had the Appellant arrested that same night. The Complainant was unequivocal that the Appellant is a neighbour and therefore a person well known to her. The Complainant's father **(PW1)** confirmed this assertion and added that they immediately proceeded to the Appellant's home upon learning from the Complainant that the culprit was the Appellant. The Prosecution also produced a pair of brown sandals that were recovered from the scene of crime, and which **PW1, PW3 and PW4** said were the Appellants; which evidence was entirely uncontroverted.

[29] This was therefore a case of recognition of a well-known neighbour and in circumstances that were favourable, the Complainant having said she had a torch that she shone on the Appellant, and was thus able to see him. It is also pertinent that she immediately mentioned his name to her parents and then to the Village Elder. That kind of identification cannot be said to be unreliable. In fact, it is now settled that there is some measure of reassurance when dealing with the evidence of recognition. In the case of **<u>Anjononi & Another vs. Republic (1980) KLR 59</u>** it was held that:

> **"...This was however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon personal knowledge**

of the assailant in some form or other. "

[30] Accordingly, having found that the Prosecution proved the three pertinent elements of the offence charged in the Alternative Count, of which the Appellant was convicted, I would be of the view that the contradiction as to the first name of the Complainant that was pointed out by the Appellant in his written submissions was not of the sort that would suffice to invalidate the conviction. This principle was well explicated by the Court of Appeal in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992** thus:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence"**

[31] Moreover, **Section 137** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**, is clear that no objection ought to be entertained where the charge is drawn in conformity with the provisions of the section. It provides that:

> ***"The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code - "***

[32] In particular, **Section 137 (d)** of the **Criminal Procedure Code** is explicit that mis-descriptions or indeed non-description of a person in a charge is not fatal. It provides as follows:

> **"the description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation*; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances,* or the person may be described as "a person unknown"**

[33] There can be no doubt that the essential ingredients of the Charges preferred against the Appellant were correctly stated. The Appellant was therefore in no doubt as to the identity of the person named as the Complainant in the particulars of those Charges. There is no allegation that the Appellant was misled or confused about the identity of the Complainant. He participated in the cross-examination of **PW3** without any complaint or hindrance. Hence the mis-spelling of the Complainant's name in the Charge Sheet was therefore of no material consequence, noting that right from the start of the Prosecution Case, the Complainant's father **(PW1)** provided the correct name of the minor. Indeed, Section 382 of the **Criminal Procedure Code** is clear that:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

[34] It is therefore my finding that the discrepancy did not cause any prejudice to the Appellant or create any doubt as to the identity of the Complainant or the guilt of the person accused.

[35] The other pertinent issue raised by the Appellant in his written submissions was that the trial court failed to conduct a *voir dire* examination before receiving the evidence of **PW3**; and therefore that the ensuing proceedings, including his conviction and sentence were irredeemably flawed. Indeed, the record does confirm that no *voir dire* was conducted by the trial court in respect of the Complainant. In this regard, **Section 19(1)** of the **Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya** 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 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.**

[36] Accordingly, the trial court was only obliged to comply with the provision aforestated if the Complainant was a child of tender years. Needless to say that not all children are children of tender years. Hence the question to pose is, who qualifies as a child of tender years? For purposes of **Section 19** of the **Oaths and Statutory Declarations Act**, it is now settled that a child of tender years is a child under the age of 14 years. In **Patrick Kathurima vs. Republic Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014 [2015] eKLR,** for instance, the Court of Appeal held that:

> **"Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this Court in MOHAMMED –VS- REPUBLIC [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in KIBANGENY –VS- REPUBLIC (Supra) that the expression "*child of tender years*" for the purpose of Section 19 of the [Act] means, "*in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years.*" That indicative age has been followed by courts ever since, See, for instance, JOHNSON MUIRURI –VS-**

REPUBLIC [1983] KLR 445, where this Court, in respect of a $13^{1}/_{2}$ year old child approved the step taken by the trial court;

"The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth".

We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children Act defines a child of tender years to be one under the age of ten years. That definition is preceded by the words *"In this Act, unless the context otherwise requires…".* That definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."

In the premises, since the Complainant herein was over 14 years as at the time she testified on **10 December 2014,** I take the view that there was no obligation on the part of the trial court to undertake a *voir dire* examination.

[37] In any case, whereas failure to comply with **Section 19** of the **Oaths and Statutory Declarations Act** can have the effect of vitiating a trial, that is not always the case. This position was explicated by the Court of Appeal in the case of **Maripett Loonkomok vs. Republic [2016] eKLR** thus:

"It follows from a long 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."

See Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015

On 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 e*xamination. The complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."

Hence, the Appellant's argument that failure by the trial court to conduct *voir dire* examination was fatal to the Prosecution Case is clearly untenable.

[38] The Appellant also submitted that he was under-age at the time of his trial and conviction and therefore ought to have received the protection accorded to minors in conflict with the law as provided for in **Section 191** of the **Children Act**. There seems to be no dispute that he was aged about 17 years as at the date of this offence; and therefore a child for purposes of the **Children Act**. It was therefore incumbent upon the trial court to make an inquiry in this regard at the first court appearance by the Appellant. Apparently this was not done. However, the Appellant's age featured in the course of the trial, and evidence was adduced by **PW2** that the apparent age of the Appellant at the time of offence was 17 years. Thus, the trial court ought to have taken this factor into account because it would have an impact on the sentence in the event of conviction.

[39] Section 191(1) of the **Children Act**, **No. 8 of 2001** provides as follows:

"In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

(a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);

(k) by making a community service order; or

(l) in any other lawful manner."

[40] The foregoing notwithstanding, it is also indubitable that the Appellant had attained the age of majority at the time he was sentenced. Consequently, the penalty of 10 years imprisonment imposed on the Appellant by the trial court cannot be faulted, noting that it is the minimum provided for in law. In **JKK v Republic [2013] eKLR,** the Court of Appeal gave the rationale for the imprisonment of such an offender as follows:

"The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence."

[41] Thus, having re-evaluated the evidence adduced before the lower court, I am satisfied that the essential ingredients of the Alternative Charge of Indecent Act with a Child contrary to **Section 11(1)** of the **Sexual Offences Act** were proved against the Appellant beyond reasonable doubt; and that his voir dire defence was taken into account by the trial court and found to be an afterthought. In the result therefore, I am satisfied that the his conviction was based on sound evidence, and that the sentence of 10 years imposed by the lower court is also lawful and in accord with **Section 191(1)(l)** of the **Children Act.** I would accordingly confirm the Appellant's conviction and sentence and dismiss his appeal in its entirety, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF FEBRUARY, 2019

OLGA SEWE

JUDGE