REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 120 OF 2017

(FORMERLY ELDORET HCCRA NO.66 OF 2013)

BK.......................................APPELLANT

=VERSUS=

REPUBLIC.....................RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 485 of 2011 delivered on the 21st day of March, 2013 by Hon. M. Ochieng, Ag. SRM]

JUDGMENT

Introduction

1. The appellant was convicted of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act and sentenced to imprisonment for 20 years on 23/3/2013. He had been arrested on 23/5/2012. As he awaited trial, the appellant was charged with an attempt to escape from lawful custody and upon conviction sentenced to imprisonment for 2 years in Eldama Ravine PMCCr. Case No. 520 of 2012 on 5/6/2012.

2. The charge of attempted escape was related to the present charge of defilement in that the signal of occurrence from Officer-in-charge of Eldama Ravine Prison of 3/6/12 *"EDR/ESC/25/4/VOL. IV/88"* indicates *"subject attempt escape. Pse be informed that an ordinary remand Prisoner EDR/169/012 BK attempted to escape from prison safe custody on 5/6/2012 at around 15:00 hours. But he was recaptured while climbing the perimeter fence.* ***He was being held for the offence of defilement contrary to section 9 (2) of the Sexual Offences Act****. He was taken to Police Station in Eldama Ravine to record statement for the same. Stapol at Eldama Ravine to prepare charge sheet for the same."*

3. The appellant was initially charged with the offence of **attempted defilement** contrary to section 9 (2) of the Sexual Offences Act by charge sheet dated 24/5/2015, which was subsequently replaced by a charge of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act by charge sheet dated 14/6/12, the conviction upon which and sentence therefor are the subject of the present appeal.

Grounds of Appeal

4. The appellant appealed from both conviction and sentence in Eldama Ravine PMCCr. Case No. 485/2012 on grounds set out in this Petition of Appeal dated 11/4/2013 as follows:

1. That the trial Magistrate erred in law and fact in failure to state the substance of the charge(s) and every element thereof in a language understandable to the accused.

2. That the trial Magistrate erred in law and fact in failure to explain on the right of appeal.

3. That the trial Magistrate erred in law and fact by imposing a sentence that is excessive in the circumstances.

4. That the trial Magistrate erred in law and fact in failure to consider the accused's mitigation.

5. That the sentence was harsh and excessive.

The grounds of appeal were filed by M/S Nyagaka & Co. Advocates.

5. On 7/7/15, M/S Adalo Bitok & Co. Advocates then on record for the appellant filed Supplementary Grounds of Appeal of that date in terms that:

1. That the learned Trial Magistrate erred in law by admitting and relying on hearsay and circumstantial evidence which was not watertight enough to warrant the conviction.

2. That the learned Trial Magistrate erred in law by relying on evidence which did not attain the required standard of proof as it lacked probative value and was unsafe for conviction.

3. That the appellant being a minor was not accorded the necessary procedural regards prescribed in the Children Act prior, during and after his trial.

4. That the sentence was unsafe there being no birth certificate produced to determine with a finality the age of the complainant.

Submissions

6. When the matter came up on appeal M/S Adalo Bitock & Co. Advocates filed submissions dated 30/6/16 principally on the ground of insufficiency of evidence to prove the charge; failure to ascertain the age of the appellant resulting in breach of rights under the Children Act and failure to consider the appellant's alibi defence.

7. At the hearing, Mr. Arusei of M/S Arusei & Co. Advocates then appearing for the appellant highlighted his submissions dated 11/12/2017 and those of M/S Adalo Bitok & Co. Advocates filed previously.

8. Ass. DPP. Ms. Esther Macharia, made oral submission in response to the appellant's said submissions and judgment was reserved. The record of the submissions made at the hearing is set out as follows:

"Mr Arusei

Appellant convicted in 2013, 25/3/2013 for the offence of defilement and sentenced to 20 years.

Petition of appeal

Appeal filed by M/s Nyagaka Advocates.

Ground 1 threshold of beyond reasonable doubt

Sentence harsh.

Supplementary Ground of Appeal dated 7/7/2015. Raising four grounds of Appeal. Submissions by Bitok dated 30/6/2016 and list of authorities dated 13/4/2016.

On 14/2/17 we filed Appellant's supplementary submissions dated 11/12/17.

I wish to adopt the whole of the written submissions. It was mandatory in the trial court to ascertain the age of the complainant which was not established beyond reasonable doubt.

For purposes of proving the charge and also for the sentence. Pw1 the complainant under oath said she was 13 years. Pw2 stated the appellant was 13 years. Pw4 another clinical officer stated that she was 14 years.

The issue of age of the complainant was critical. The age of the child should have been established.

Sexual Offences Act provides for different sentences according to age. The trial Court accepted 14 years as the age without analyzing the evidence of Pw1 and Pw2.

No medical evidence was placed before the trial Court. No birth certificate. No age assessment except one line by 14 years. He did not give scientific basis for the assessment.

The age was not proved beyond reasonable. It was not established that complainant was 14 years to warrant the sentence of 20 years. The Court should quash the conviction and set aside the 20 years sentence.

Penetration under section 8 (1) of the Sexual Offences Act. The P3 form states the on examination the external genitalia was swollen. ***Hymen was not intact****.*

When was the hymen broken? It was not shown that the breaking was as a result of the act complained.

Voire dire examination

The Court found that the composed was not confused and ordered that she gives evidence trial Court said that he found the complainant's evidence credible. There was no reason or ground rendered. Unsworn evidence should be corroborated. The court should not find that the charge was not proved.

The trial Court may accept the evidence of a minor but it must give reason for accepting the evidence of the child whom the court had found the child was not composed. The Court should then evaluate the evidence.

The case was not proved beyond reasonable doubt.

I rely on the list of authorities attached to the submissions of 14/12/2017.

Mr. Arusei on submissions of Bitok Advocate.

Age of the appellant. The age of the appellant was not assessed. He may be a minor as the time, he was of school going. No evidence was tendered on the age of the appellant.

The Court of Appeal has found that without assessment of age of the appellant, conviction was held to be unsafe.

Sexual Offences Act in sentences is subject to the Children Act.

I pray that the appeal be allowed.

Miss Macharia for DPP

Appeal is opposed. The medical evidence by Pw2, there is no doubt that complainant was taken to hospital a day after the incident. On examination, except for Labia which appeared swollen and the hymen was not intact. According to Pw2, these showed the complainant had been defiled. I refer to page 17 line 16-17.

***Whether it was appellant who defiled the complainant**. Appellant was positively identified by Pw1 as he was a nephew and also a relative. The 1st report of Pw1 to Pw3, a teacher and guardian of the complainant was clear that it was the appellant who had defiled.*

Pw3 at page 10 of typed proceedings lines 2-3 states that she examined the Pw1 and the private parts were swollen and was complaining of pain.

At page 11 line 6-7 Pw3 stated that if the complainant had not complained to her she would not have known that it was the appellant and she had no reason to implicate the appellant.

Age was assessed at 14 years by Pw4. Pw4 testified that when the complainant visited her she had no birth certificate.

Page 13 line 2-3 Pw4 testified that with no documents to prove age, the only option was to conduct an age assessment which he did and the same indicated that she was 14 years. The age assessment was provided as exhibit. There was no objection to the production of the age assessment which was a legal document produced.

*Age of the appellant was only raised at the end of the trial after the appellant had been convicted. Appellant produced a birth certificate which had different names of **EB** and showed the date of the birth as 4/6/1995 implying that the appellant was a minor at 17. The names in the charge sheet were **BK**.*

At page 5 of the proceedings the trial Magistrate rejected the birth certificate on the ground that the Court could not ascertain the birth certificate belonged to the appellant. The age of the appellant was an afterthought aimed at interfering with the sentence as it was only raised at the end of trial.

Appellant did not attach any affidavit to show that the names on the certificate were his names. Section 8 (1) and 8 (3) provides for minimum of 20 years. Appellant was given the sentence under the law. The evidence on the case is overwhelming. We pray that the appeal be dismissed.

Mr Arusei

In the defence evidence at page 32 of typed proceedings, appellant denies defilement and states that there was a grudge between complainant's family. The grudge was not investigated and the Court never gave the grudge any treatment.

The appellant gave an explain action of the grudge.

Examination of the complainant.

It was not one day after the incident. Charge sheet reads 19/5/2012 as the date of offence and the P3 was filled 3 days later.

At page 7, the examiner states that there were no blood stains, no bruises and hymen not intact. The breaking of the hymen is not evidence of defilement.

The age assessment certificate does not indicate the assessment basis. There is no scientific basis for the assessment. The law states that it is medical evidence. The witness does not state how he conducted the assessment. The prosecution could have allowed for a qualified medical doctor to

give evidence.

The issue of identification is not relevant as there is a grudge. The conviction was unsafe.

Age of the child indicating the she was 13 years by Pw1 and Pw2. ***There is no basis for disregarding the evidence of the two witnesses***. *The Court did not give reason why she did not believe them. Why should the Court believe them on the evidence and not the age evidence? The case was not proved beyond reasonable doubt.*

Issues for retention

9. Upon considering the evidence before the Court and the submissions by the parties, consistently with the duty of the 1st appellate Court as set out in ***Okeno v. R*** (1972) EA 32, the Court finds the issues for determination as follows:

1) Whether the defilement of the complainant was proved beyond reasonable doubt;

2) Whether the appellant was shown to have been the perpetrator;

3) Whether the appellant was a minor at the time of commission of the offence and trial, and the impact of this on the legality of the trial; and

4) Whether the appellant was guilty of the alternative charge or a lesser offence or attempt for which he may be convicted even though not charged with the same, in accordance with the law.

Determination

Preliminary

10. The issue of the age of the appellant came up at the sentencing proceedings on 22/3/2013. When it is shown a Mr. Bosire appeared for the accused and upon confirming that the accused had a previous record mitigated that accused was a minor as follows:

"22.3.13

Coram

Before: M. Ochieng

Court Prosecutor: IP Atonga

Court Clerk: Nancy

Accused: present Mr. Bosire holding brief for accused

Prosecutor: accused has one previous record in Cr. 520 of 2012. Accused was charged with escape from a lawful custody contrary to section 123 Penal Code. He pleaded guilty and was sentenced to 2 years in prison on 5.6.2012.

M. OCHIENG

AG. SENIOR RESIDENT MAGISTRATE

Mr. Bosire*: the records are correct.*

M. OCHIENG

AG. SENIOR RESIDENT MAGISTRATE

Accused in mitigation*: Accused is remorseful. He is a young man aged 17 years."*

11. The Birth Certificate indicating the accused's date of birth as 14/6/1995 was sent for verification by the Court to the Registrar's Office. It would appear that the Certificate was not taken for verification as the Prosecutor pointed out that the names on the Certificate given as EB did not correspond with the names of the accused on the file as follows:

"25.3.13

Coram

Before: M. Ochieng – Ag. SRM

Court Prosecutor: IP Atonga

Court Clerk: Irine

Accused: Present Mr. Bosire for accused present

Prosecutor: *After going through birth certificate given by defence, I noticed that the names therein do not correspond with the one in the file.*

M. OCHIENG

AG. SENIOR RESIDENT MAGISTRATE

Bosire: *The names that accused gave police is EB.*

M. OCHIENG

AG. SENIOR RESIDENT MAGISTRATE

Court: *Notes that the name on the Birth Certificate No. [particulars withheld] is EB while accused herein is BK. I therefore cannot be certain that the birth certificate belongs to one and the same person as accused age was never raised at any stage of hearing.*

Accused to serve 20 years in jail.

Right of Appeal Explained.

M. OCHIENG

AG. SENIOR RESIDENT MAGISTRATE

25.3.2013

Mr. Bosire: I pray for copies of proceedings.

M. OCHIENG

AG. SENIOR RESIDENT MAGISTRATE

Court: Copies of proceedings to be issued to accused at his own costs.

M. OCHIENG

AG. SENIOR RESIDENT MAGISTRATE

25.3.2013"

12. The trial Court rejected the Birth Certificate off-hand and proceeded to sentence the accused to imprisonment for 20 years as follows:

> *"Court: Notes that the name on the Birth Certificate No. [particulars withheld] is EB while accused herein is BK. I therefore cannot be certain that the birth certificate belongs to one and the same person as accused age was never raised at any stage of hearing.*
>
> *Accused to serve 20 years in jail.*
>
> *Right of Appeal Explained.*
>
> ***M. OCHIENG***
>
> ***AG. SENIOR RESIDENT MAGISTRATE***
>
> ***23.3.2013***

13. The question of the accused's age was taken on appeal up and by order of 8/10/2015 (extracted on 10/3/2016), the High Court at Eldoret (Kimondo, J.) ordered as follows:

> *"08/10/2015*
>
> ***Court:*** *An important aspect of this appeal is to establish the age of the appellant at the time he committed the offence. I direct at the original Birth Certificate Number [particulars withheld] on the Court record be given to the State for verification. It shows the appellant was aged about 17 years at the time of the offence."*

The Report from the Registrar of Persons on the Birth Certificate of the appellant was never received and the Court in appeal apparent exasperation on 30/6/16 directed that the appeal be listed for hearing. The High Court at Eldoret thereafter transferred the appeal to Kabarnet High Court for hearing by order of 2/2/17.

14. Upon a previous Order of the Court dated 29/7/15, the Officer in-charge of G.K. Prison Eldoret Main by letter dated 23/7/15 forwarded a Radiology Report from the Moi Teaching and Referral Hospital dated 17/7/15 on X-ray of Pelvis and Wrist of the appellant with findings dated 23/7/15 indicating as follows:

> *"The distal radio-ulnar epiphyseal plates are fused. The proximal femoral epiphyseal plates are fused.*
>
> *Impression's over 18 years."*

15. The question of the appellant's age at the time of commission the offence and during trial remains undetermined and on the basis of the Birth Certificate indicating date of Birth as 14/6/1995, the benefit of doubt ought to have been given to the appellant to place him at under 18 years during the trial which according with Judgment and sentence of 21/3/2013 means the appellant was tried as a minor (he would have been 18 on 14/6/13) who in accordance with the Children Act was entitled to the fair trial guarantee of right to legal representation stipulated by section 186 of the Children Act.

Conviction for attempted escape Cr. Case No. 520/12

16. As a consequence, the appellant's trial for attempted escape in Eldama Ravine PMCr. Case No. 520 of 2012 for which he is charged, convicted and sentenced on 5/6/12 was a nullity as he was not shown to have been represented the trial in which he pleaded guilty and was convicted on plea of guilty. See proceedings in the Record of Appeal for 5/6/12 and 22/3/13.

Defilement trial Cr. 485 of 2012

17. On a physical count of the record of proceedings in the appellants trial for charge of defilement, it appears that the appellant was represented on and off by Counsel contrary to sections 77 and 186 (b) of the Children Act, the latter which in mandatory terms provides that:

> *"Every child accused of having infringed any law shall –*
>
> *(b) If he is unable to obtain legal assistance be provided by the Government with assistance in the preparation and presentation of his defence."*

18. The appellant was not represented at plea taking on 24/5/2012 attempted defilement charge and on 14/6/12 on the substituted defilement charge. On 28/6/12 when the complainant Pw1 and Pw2 testified, he was represented by Mr. Nyagaka as well on 2/8/12 when Pw3 and Pw4 testified. On 19/12/12 when Pw4, the Clinical Officer presented complainant's age assessment the appellant was represented by Mr. Songoyo who held brief for Mr. Nyagaka.

19. On 1/3/2013 at defence hearing the trial Magistrate had forced the appellant to proceed with his defence without representation by Advocate but happily the advocate came in before the appellant had gone too far in proceedings as shown below:

> *"1/3/13*

Coram

> *Before: M. Ochieng – Ag. S.R.M.*
>
> *Court Prosecutor: IP Atonga*
>
> *Court Clerk: Nancy*
>
> *Accused: Present*
>
> *DW1 – Unsworn in Kiswahili Male Christian: I am BK. I live in [particulars withheld]. I am a student.*
>
> ***M. OCHIENG***
>
> ***RESIDENT MAGISTRATE***
>
> *Accused: I am waiting for my lawyer.*
>
> ***M. OCHIENG***
>
> ***RESIDENT MAGISTRATE***
>
> ***Court:*** *Notes that it is now 11:00 a.m. defence advocate has adjourned matter 3 times. Matter to proceed as scheduled.*
>
> ***M.OCHIENG***

RESIDENT MAGISTRATE

1.3.2013

DW1 when I was caught I was from school. When I asked I was told I would know ahead. I was taken to police station. My finger prints were taken.

Later at 11.05 a.m.

Mr. Songoyo for accused present.

Mr. Songoyo – Accused has 2 witnesses. Accused will give sworn evidence."

20. On the whole, I would find that the right of legal representation for the appellant was not, in regard to the charge of defilement herein, violated despite want of legal representation at plea taking as a plea of not guilty was entered and that at defence stage, the situation was arrested and rectified upon entry of the defence Counsel who then led the accused in a sworn testimony.

<u>Whether the offence of defilement proved</u>

21. The evidence of defilement is given by the minor victim Pw1 aged allegedly 13 years on her testimony (but assessed by Pw4 at 14 years).

The Court conducted a voire dire examination before admitting her evidence finding that:

"Minor not composed of good understanding of Oath. She is to give an unsworn statement. She had warned to tell the truth."

The whole proceeding of the voire dire and evidence of Pw1 is set out below:

*"**Voire Dire***

What is your name?

I am T.C.

How old are you?

I am 13 years old.

Do you go to school?

Yes, [particulars withheld] Primary School.

Which class?

I am in class 5.

Do you go to Church?

Yes, I go to Catholic Church at [particulars withheld]

Do you know God?

Yes.

Who is God?

Nil.

Where are you today?

We are in Court.

Is Court a place to tell lies?

No.

Do you see a police man?

Yes.

What does a policeman do to people who tell lies?

He arrest them.

Minor not composed of good understanding of oath. She is to give unsworn statement

PW1

*I am TC I live at[particulars withheld] with my mother J. I go to school at [particulars withheld] Primary School, class 5. I am 13 years old. I recall on 19.5.2012 at 5.00 p.m. I was told to go get firewood in the forest. I went alone it is not too far from home. I arranged my firewood. I saw B accused herein in front of me (accused pointed out). He was 1 metre away. He was alone. He had nothing on his hands, I stood. He told me I would be his wife. I asked why he was not going to school and other children are going to school. He pulled me. He held my shirt collar and held me up to the forest. He was not saying anything as he pulled me. He removed my inner wear. He had laid me down. He laid on me and opened his trouser. I fell looking upwards. He did **"tabia mbaya**" I raised alarm he told me at last as he wanted to go that is should tell anyone. I felt pain in place of urinating. He heard someone run. He left me. I took my firewood. He ran. I went home and told my mum. No one came. I took my inner wear home. I told my mother. We went to accused's home. We are neighbours. My mum asked B. He said it is the way the child has said. I went back home. The next day I went to hospital with my mother."*

22. I would find that the trial Court properly conducted the voire dire and the question that remains is whether the complainant's evidence was corroborated as required. See Kenya Judiciary Bench Book, 2018 at page 82 – 3.

23. To be sure, the evidence of Pw1 is not conclusive as to whether there was penetration or whether the intended penetration was interrupted by the sound of running man at which the appellant bolted. She said *"He did tabia mbaya….I felt pain in the place of urinating. He heard someone run. He left."* It is not clear at what stage the assailant left, before or after he had achieved penetration, even with the meaning of partial penetration of section 2 of the Sexual Offences Act.

24. In these circumstances, the medical evidence is crucial. Although section 124 of the Evidence Act allows the Court to convict only on the evidence of the victim of the Sexual Offences, the trial Court must record the reasons for believing the victim is telling the truth as follows:

"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof

implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

Even if, the trial Court believed the Pw1 to be telling truth, what is the truth told? As pointed above, it is unclear whether the *"tabia mbaya"* done by the assailant amounted to penetration or it was interrupted, making it a case of attempted penetration. This would appear to give credence to the initial charge of attempted defilement contrary to section 9 (2) of the Sexual Offences Act.

25. The trial Court did not indicate on record that it had, for reasons recorded, believed the complainant for purposes of a conviction based on section 124 of the Evidence Act. The trial Courts judgment only considered the charge proved on evidence of the complainant as being supported by the medical evidence as follows:

"I have considered the evidence on record. Complainant's evidence is credible. She described how accused defiled her in the forest. Clinical Officer's report indicated that complainant had swollen labia and hymen was not intact. Her age, though not ascertained by complainant as she did not have a birth certificate was assessed to be approximately 14 years old which age I choose to adopt.

I find that in the aforesaid, the prosecution has proved its case beyond reasonable doubt. Noting that complainant positively identified him as the perpetrator. I therefore must find accused person guilty of the offence in the main count and proceed to convict him accordingly under section 215 of the Criminal Procedure Code."

26. This Court in re-elevating the evidence before the trial must, therefore, consider whether there is evidence to corroborate the <u>unsworn</u> evidence of the complainant Pw1. See ***Oloo v. R*** (2009) KLR 416.

<u>Medical Evidence</u>

27. The Clinical Officer, Pw2 testified as follows:

*"**PW2***

The patient was 13 years. History, the child was brought to hospital by a guardian. She stated she was raped by a known person. On Monday 21st the girl was brought to me. There were nurses who had examined the girl and were not conversant with filling. The new form called post rape form. I filled it. I examined the girl who looked disturbed. Complained of neck pain. The top button of the shirt was lost and 2nd button loose. The girl told me the perpetrator fell her down and penetrated her. During the act, heard some noise and he took off. Most of the body was ok except for the labia which appeared swollen and hymen was not intact. No discharge from vagina. No blood stain. P3 form now exhibit 3 MFI – 1 referred. It is from my facility. Patient corresponds to the name in P3 form age 13 years. MFI -1 now exhibit 1."

The examination was done on 21/5/2012 two days after alleged defilement on 19/5/2012, labia appeared swollen, no discharge from vagina, no blood stain and *"hymen was not intact."*

He was cross-examined on Ex. No. I, a Physical Examination and Treatment Card from Emining Health Centre where the complainant was treated the previous day on 20/5/12, and indicated *"no pus cells seen. No spermatozoa seen."* He said:

"I did not fill Ex. No. I.

It was filled by sister R and sister K. Urine was from the child. <u>Finding</u> we find urine to be normal.

There were no spermatozoa see. We expect to find it after ejaculation."

28. It is note-worthy that the examination on the first day after the incident did not find *"swollen"* labia that the Clinical Officer observed 2 days after the alleged incident. In addition, although ejaculation is not an ingredient of penetration, in the circumstances of this case where there was evidence that the alleged act was interrupted by the sound of a running man after which the assailant allegedly left, there is a basis from finding that the penetration may not have been achieved. The credibility of observation of swollen labia a day after no such observation having been made on the first material examination is put to doubt. I do not find the medical evidence in this case to corroborate, as required, the evidence of the complainant that there was penetration.

29. The evidence of PW3, the complainant's auntie relates only what the child allegedly told her, her only relevant observation being that *"I looked at the child's private part. It was swollen and she was complaining of pains."*

30. The evidence of the swollen private parts, she complained of pain and the hymen not intact observations are not wholly consistent with the evidence of lack of blood in the child's urine and private parts, clothes even though as testified by the auntie *"the child took a bath after 2 days."* The P3 presented by Pw2 itself indicated *"vaginal examination. External genitalia appears swollen i.e labia's. No blood stains or bruises and Hymen not intact."*

31. The case of missing button on her blouse is consistent with the evidence of the assailant pulling the complainant by the collar but it is not evidence of defilement.

32. The evidence before the Court could only prove, and be consistent with attempted defilement and not defilement itself as the complainant's unclear testimony of *"tabia mbaya"* does not of itself indicate extent of the assailant and penetration is not corroborated by the available medical evidence.

<u>Whether the appellant was the perpetrator</u>

33. There was no question of mistaken identification. The appellant is a relative of the complainant. It was during the day at 5.00 pm, the complainant spoke to the appellant asking him why he was not at school. The complainant said the appellant was a neighbor. Pw3, the complainant's auntie disclosed that the accused was her husband's cousin, and she said that the complainant had told her on being asked why she came home late at 7.00 pm, that the *"accused did tabia mbaya."*

34. In his sworn testimony, the appellant testified as follows:

> *"**DW1***
>
> *I am BK. I am aware of the case herein. On 19.5.2012 when I left school at [particulars withheld] Secondary School at form 2, I went home changed got outside. I saw 2 people. A lady and a man called JC and an Officer. They arrested me. It was at 5.00 p.m. I asked what was wrong. I was told I would find out ahead. I was taken to police station. My finger prints were taken. I was put in cells. I only knew my offence in Court. <u>I knew complainant but not so well. I saw her the first time in Court. We are not related, complainant stays in our family. She was staying in a family where I am related to. We are from the same clan</u>. On 19.5.2012 I did not see Complainant. Complainant's mother and my family had an issue over a cow. There was a grudge."*

35. DW2, accused's brother and DW3, his auntie, also testified to the circumstances surrounding the accused's arrest in the evening of 19/5/12 that the complainant's guardian, PW2 J had gone to the accused's home, came with a panga and stick. Both witnesses said they heard that accused had done something wrong and that on being asked the complainant had said *"if the issues are lies, she replied they were lies"* and that *"complainant [said] accused did not touch her or tear her clothes."*

36. The Defence evidence was clearly aimed at saving the appellant from the consequences of the act.

Weighed against the evidence of the Pw1 and the first report to Pw2 demonstrating the consistency of the complainant, the same does not raise any doubt that the appellant was not involved in the incident where the complainant was pulled, thrown down and inner clothes and defilement attempted until the act was interrupted by the sound of a running man at which point the appellant left the complainant.

<u>Finding of the Court</u>

37. On the basis of the Court's finding on the evidence adduced by the Prosecution and the defence before the trial Court, I find the appellant guilty of the offence of attempted defilement contrary to section 9 (2) of the Sexual Offences Act.

38. The conviction and sentence for defilement contrary to section 8 (1) and 8 (3) of the Sexual Offences Act will, consequently, be quashed and set aside, respectively.

39. The specific age of the minor complainant has no relevance to the offence of attempted defilement which only requires that the victim be a child. However, as regards the defilement charge, the age of 13 years as given by the complainant and on the P3 form and the assessment of 14 years are in the same penal bracket for section 8 (3) of the Sexual Offences Act and no prejudice could be shown by the trial Magistrate's acceptance of 14 years as the age given in the assessment report conducted by the Clinical Officer Pw4 who only *"assessed the age using the year of birth she alleged to have been born between 1996 – 1997. Around 14 years old."*

Be that as it may, the offence of attempted defilement contrary to section 9 (1) of the Sexual Offences Act is committed when-

> *"A person attempts to commit an act which would cause penetration with a child…"*
>
> *Child is defined under section 2 of the Sexual Offences Act consistently with the Children Act as "any human being under the age of eighteen years."*

<u>Conclusion</u>

40. Section 180 of the Criminal Procedure Code allows the Court to convict for attempt even if the person convicted was not charged with attempt. The accused herein was initially charged with attempt but upon substitution of the charge of the defilement, the only other charge he was charged with is the alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

41. The facts the case herein being more consistent with attempted defilement and the penalty for attempt contrary to section 9 (2) of the Sexual Offences Act being the same as that of indecent act contrary to section 11 (1) of the Sexual Offences Act, the Court convicts the appellant for the appropriate charge of attempt contrary to section 9 (1) as read with 9 (2) of the Sexual Offences Act.

42. In terms of section 333 (2) proviso of the Criminal Procedure Code that requires the Court when considering on imprisonment sentence to take into account such period as the person has been in detention awaiting trial, the sentence of imprisonment to be imposed on the appellant will be reckoned from the date of arrest on 23/5/2012. The appellant was convicted and sentenced to imprisonment for 2 years for attempted escape from lawful custody in proceedings, which this Court has found a nullity because of breach of the appellant's right to legal representation as a child accused of having infringed any law pursuant to section 186 (b) of the Children Act.

The period of pre-trial detention runs from the date of his arrest and remand awaiting his trial from the charge herein.

43. The accused has therefore been in custody for almost 7 years (as at 23/5/2019), shy by only 1 month and 22 days.

44. The penalty for attempted defilement is minimum imprisonment for 10 years. The appellant is therefore sentenced to imprisonment for 10 years. The period of the sentence shall commence on the date of his arrest on 23/5/2012. With remission the appellant would serve (80 months) six years, seven months.

Orders

45. As the appellant has already served the sentence of imprisonment for 10 years with remission in full, there shall be an order for his release from custody forthwith, unless he is otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED THIS 8TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Arusei & Co. Advocates for the appellant.

Ms. Macharia, Ass. DPP for the Respondent