REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 69 OF 2015

JONAH KIPSEREM MOSOGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate's Court at Eldoret

(Hon. T. Olando) dated the 15 May 2015 in Eldoret Chief Magistrate's Criminal Case No. 5163 of 2012)

JUDGMENT

[1] This appeal arises from the Judgment delivered on **15 May 2015** by **Hon. T. Olando (RM)** in **Eldoret Chief Magistrate's Criminal Case No. 5163 of 2012: Republic vs. Jonah Kipserem Mosogei**. The Appellant, who was the accused in that case, had been charged before the lower court with six counts under the **Sexual Offences Act, No. 3 of 2006**. In Counts I, III and V, the Appellant had been charged with defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act;** while in Counts II, IV and VI, he was charged with indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act.

[2] The record of the lower court shows that the Appellant denied the charges and that at his trial, the Prosecution called 8 witnesses in proof of their allegations. The Appellant was also given an opportunity to adduced evidence on his own behalf. Ultimately, the court was convinced as to the truthfulness of the Prosecution Case. Accordingly, the Appellant was found guilty and was convicted in respect of Counts I, IV and VI and was sentenced to life imprisonment for defilement as charged in Count I, and concurrent sentences of 10 years imprisonment for each of the two Counts of indecent act with a child laid in Counts IV and VI. He was acquitted of Counts II, III and V.

[3] Being aggrieved by his conviction and sentence, the Appellant lodged this appeal on **28 May 2015**. His initial Grounds of Appeal were that:

[a] The Learned Trial Magistrate erred in law and fact in failing to note that the Prosecution witnesses were not credible.

[b] That the Learned Trial Magistrate erred in law and fact in failing to hold that the evidence tendered by the Prosecution witnesses was inconsistent;

[c] That the Learned Trial Magistrate erred in law and fact in failing to consider his evidence in defence;

[d] That the Learned Trial Magistrate erred in law and fact in failing to consider that the evidence adduced in the case was full of contradictions.

[4] The Appellant subsequently filed Supplementary Grounds of Appeal contending that the Learned Trial Magistrate erred in law and fact by:

[a] failing to understand that the age of the Complainant was not proved beyond reasonable doubt;

[b] failing to observe that the medical evidence did not prove the element of penetration to the level required by the law;

[c] failing to note the gross inconsistencies and glaring contradictions in the chain of evidence;

[d] believing and interpreting that the minors were credible witnesses without corroboration by any adult witness;

[e] failing to observe that the clinic cards adduced as exhibits had anomalies that greatly undermined their credibility;

[f] failing to observe the variance between the charge sheet and the evidence on record.

[5] It was in the light of the foregoing that the Appellant prayed that his appeal be allowed, and the conviction and sentence passed against him set aside. He urged his appeal by way of written submissions which were attached to the Amended Grounds of Appeal**.** He took issue with the contradictory nature of the evidence adduced by the Prosecution in respect of the age of **IC**, the Complainant in respect of Count I (hereinafter the 1st Complainant), observing that whereas she indicated in *voir dire* that she was 12 years, the evidence of her mother and **Dr. Yatich (PW7)** was that the minor was 10 years old at the time of the offence. He further impugned the Clinic Card for **IC** contending that it is not only unstamped for purposes of authentication, but also contains blurred entries, which in his view are indicative of mischief. The Appellant relied on **Criminal Appeal No. 59 of 2011: Simeon Wanjala vs. Republic** in urging the Court to find that the age of the 1st Complainant was not proved beyond reasonable doubt.

[6] On penetration, the Appellant's submission was that **Dr. Yatich** was of no assistance to the lower court, granted that she merely attended court to testify on behalf of **Dr. Cynthia Kibet**. It further his contention that it was significant that **Dr. Kibet** did not notice evidence of penetration in respect of the 2nd and 3rd Complainants; and therefore that she contradicted the evidence of the minors, thereby exposing their lies. Accordingly, the Appellant urged the Court to reconsider all these discrepancies, including the impugned Clinic Cards and find that there was no credible evidence to sustain his conviction.

[7] The appeal was opposed by **Mr. Mulamula**, Learned Counsel for the State. His submission was that all the ingredients of the offence of Defilement were proved by the Prosecution Witnesses and that the evidence of the Complainants was well corroborated. He added that, where there was no proof of penetration, a conviction was recorded for the offence of indecent act with a child. Thus, **Mr. Mulamula** urged the Court to dismiss the appeal and uphold both the conviction and sentence.

[8] I have given careful consideration to the appeal and taken into account the written and oral submissions made herein. I am cognisant of the requirement that, in a first appeal such as this, the Court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. (See **Okeno vs. Republic [1972] EA 32).**

[9] As has been pointed out hereinabove, the Appellant was charged with two substantive counts under the **Sexual Offences Act** in respect of each of the three minors. Hence, in Count I, the Appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the Charge were that on the 26th day of November 2012 at Kambi Kuku Village in Uasin Gishu District within Rift Valley Province, the Appellant unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ, namely vagina of **IC**, a child aged 10 years. In Count II, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act,** in that on the 26th day of November 2012 in Uasin Gishu District within Rift Valley Province, he allowed his genital organ (penis) to come into contact with the genital organ, namely vagina of **IC**, a child aged 10 years.

[10] In Count III, the Appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the Charge were that on the 27th day of November 2012 in Uasin Gishu District within Rift Valley Province, the Appellant unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ, namely vagina of **MC**, a child aged 6 years; while in Count IV, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars thereof were that on the 27th day of November 2012 in Uasin Gishu District within Rift Valley Province, he allowed his genital organ (penis) to come into contact with the genital organ, namely vagina of **MC**, a child aged 6 years.

[11] In Count V, the Appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act;** and the particulars of the Charge were that on the 27th day of November 2012 in Uasin Gishu District within Rift Valley Province, the Appellant unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ, namely vagina of **FC**, a child aged 5 years. Lastly, in Count VI, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars thereof were that on the 27th day of November 2012 in Uasin Gishu District within Rift Valley Province, he allowed his genital organ (penis) to come into contact with the genital organ, namely vagina of **FC**, a child aged 5 years.

[12] By way of evidence, **IC,** the 1st Complainant, testified as **PW1** and told the lower court that she was at home on the **26 November 2012**, playing her sister, **FC** (the 2nd Complainant) when the Appellant called her into the kitchen. She was then a pupil in Class 7 and the Appellant was working for her parents as a herdsman. **PW1** explained that the Appellant locked the door and then ordered her to remove her clothes and proceeded to defile her; after which he sternly warned her, on the pain of death, not to reveal the incident to anybody. **PW1** explained that her mother had travelled to Uganda and therefore, out of fear, she did not reveal the occurrence to anybody; and that, on the day following her defilement, the Appellant subjected her sister **(FC)** and a neighbour's child, **MC** to the same ordeal. She added that this time, she spoke up and informed the mother of **MC** who raised alarm that led to the arrest of the Appellant by members of the public; after which they were escorted to **Turbo Hospital** for examination and treatment.

[13] The testimony of **MC,** who was **PW2** and the 2nd Complainant before the lower court, was that she was at home on **27 November 2012** with her brother when the Appellant told her to go and collect milk for the children. Thus, she accompanied the Appellant to the home of the parents of the 1st Complainant. That on arrival, the Appellant led her into the kitchen and then forced her to remove her clothes before defiling her. She further testified that her screams alerted **FC** who pushed the door open; and that as she was pushed out of the kitchen by the Appellant, the Appellant got hold of **FC** and pulled her into the kitchen and defiled her. **PW2** further stated that she went home and informed her uncle called **Kiptoo**. She was taken to **Turbo Hospital** the following day. She confirmed that she knew the Appellant before this incident and that he was then working in the neighbouring home of **PW1's** parents as a herdsman.

[14] The 3rd Complainant, **FC (PW3),** confirmed that, on **27 November 2012,** she was at home with her sister, **IC (PW1);** and that while they were playing, the Appellant called **PW1** into the kitchen and locked the door. She further testified that she went and pushed the door

and thereupon, the Appellant left **PW1** and pulled her into the kitchen, removed her clothes and defiled her. She added that she was unable to scream because the Appellant had blocked her mouth; but that when the Appellant set her free, she went and called **Rael** who in turn, informed **PW2**'s mother of the incident. She further confirmed that she was taken to **Turbo Hospital** for examination and treatment.

[15] The mother of **PW1** and **PW3** testified before the lower court as **PW4**. She confirmed that she had travelled to Uganda on a business trip and left her children under the care of the Appellant who was then working for her as a farmhand. She further stated that, on the evening of **27 November 2012,** while in Uganda, she received information from **Jonah** that the Appellant had defiled the children and had been arrested and taken to the Police Station. She testified that, in addition to requesting her neighbour to take the children to hospital, she travelled back home the same night and took the children to **Turbo Hospital** the next morning; and thereafter to **Moi Teaching and Referral Hospital**. She produced the Child Health and Clinic Cards for **PW1** and **PW3** as exhibits before the lower court. It was her testimony that **PW1** was born on **28 August 2002.**

[16] The 2nd Complainant's mother testified as **PW5**. Her evidence was that she had gone to Eldoret Town Market when she received a telephone call from **Jonah Kiptoo** that **MC** had been defiled by the Appellant. She went back home and found that the Appellant had already been arrested by members of the public. She took **PW2** to **Turbo Hospital** and later to **Moi Teaching and Referral Hospital**. She produced the Clinic Card for **PW2** to augment her evidence that **PW2** was born on **12 December 2006**.

[17] Jonah Kiptoo (PW6) also gave evidence before the lower court. He confirmed that at about 4.00 p.m. on **27 November 2012**, he went to collect a debt from **PW5;** and that on arriving at her house, he found the Appellant sitting on a blanket on the floor with one of the children; and that **PW2** was beside them and that she was crying. That he asked **PW2** why she was crying and was told that the Appellant had asked her to go to the home of **PW4** to collect milk, but had instead been defiled by the Appellant. **PW6** testified that, the Appellant thereupon jumped over the fence and disappeared. **PW6** added that he called the neighbours and the village elder; and that the Appellant was arrested and taken to **Turbo Police Post.**

[18] Dr. Jane Yatich (PW7) produced the P3 Forms in respect of the three minors and testified that the examination was done by **Dr. Cynthia Kibet** who had left their facility for further studies in the **United States of America**. She confirmed that the minors had all been examined by **Dr. Kibet** on **29 November 2012**; and their respective P3 Forms filled on **30 November 2012**. The P3 Forms were marked the **Prosecution's Exhibits 1, 2 and 3**, respectively.

[19] P.C. Titus Ole Goro (PW8) was the Investigating Officer. He confirmed that the Appellant was presented to Turbo Police Post by members of the public on **27 November 2012** on allegations that he had defiled three minors. He then issued the parents of the minors with P3 Forms which were later returned to him duly filled. He recorded the statements of the witnesses, and upon concluding his investigations, he caused the Appellant to be charged accordingly.

[20] The lower court weighed the Prosecution case against the Appellant's defence; which was that he was falsely accused at the instigation of the mother of the minors; and that this was because he demanded for his dues. The Learned Trial Magistrate was not persuaded by the Appellant's defence. He thus held that:

> **"Considering the evidence of the complainants which was well corroborated and which was not challenged by the defendant I find that the accused committed an indecent act with the two children M.C. and F.C.**
>
> **I therefore find that the prosecution have proved their case beyond reasonable doubt and I find the accused guilty in count one of the offence of Defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. I also find the accused guilty in counts 4 and 6 of the offence of Indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.**
>
> **I however find the accused not guilty of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 in count 3 and 5 and he is acquitted in counts 3 and 5. I also acquit the accused in count 2 of the offence of Indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006."**

[21] The foregoing being the summary of the evidence upon which the Appellant was convicted by the lower court, can it be said that conviction and sentence were based on a sound foundation? In respect of Count I, **Section 8(1) and (2)** of the **Sexual Offences Act** stipulates that:

> **(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement;**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**

[22] Thus, as rightly observed by the lower court, the Prosecution was under duty to prove the following ingredients of the Charge beyond reasonable doubt:

> **[a]** the age of the 1st Complainant and whether she was then a child aged 11 years or less;
>
> **[b]** Penetration of **PW1**'s genital organ;
>
> **[c]** Whether the penetration was committed by the Appellant.

[a] <u>On the Age of the 1st Complainant:</u>

[23] There is no gainsaying that for purposes of **Section 8** of **the Sexual Offences Act,** the age of a Complainant is an essential ingredient that must be proved beyond reasonable doubt; not only for purposes of proving that the Complainant is a minor, but also for purposes of sentence, should the accused person be found guilty at the end of the trial. This observation was aptly made in **<u>High Court Criminal Appeal No. 34'B' of 2010: John Otieno Obwar vs. Republic</u>** by **Hon. Makhandia, J.** (as he then was) thus:

> **"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger the victim, the stiffer the sentence. Accordingly it is important that the age of the victim to be proved by credible evidence..."**

[24] Similarly, in **<u>Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010</u>** the Court of Appeal stressed this point thus:

> ***"Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".***

[25] Accordingly, **Rule 4** of the **Sexual Offences Rules of Court Rules** recognizes that:

> **"When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."**

[26] In proof of the age of the 1st Complainant, evidence was presented before the lower court by **PW1** that she was then a Class 7 pupil at **Mogoywet Primary School**. Although she did not give her age or date of birth, her mother **(PW4)** augmented her evidence and testified that she was born on **28 August 2002. PW4** produced the Child Health Card for **PW1** as the **Prosecution's Exhibit No. 2** before the lower court. That document confirms **28 August 2002** as the 1st Complainant's birthday. I note that the document was challenged by the Appellant on account of faintness, some overwriting and cancellations thereon. It is however clear that, the overwriting noted is only in respect of the surname of the parents and not the name of the baby or the date of birth; which were critical to the issues before the lower court. There was otherwise no proof that the document was a false document as alleged by the defence before the lower court. There was therefore no reason for the lower court to doubt that **PW1** was born on **28 August 2002**. That being the case, it is manifest that, as of the date of the offence, the 1st Complainant was 10 years and 4 months old; and therefore a child for purposes of **Section 2** of the **Sexual Offences Act,** as read with **Section 2** of the **Children Act**, **No. 8 of 2001.**

[27] The Appellant also took issue with the fact that in *voir dire*, **PW1** gave her age as 12 years, which is the age that was relied on by the Learned Trial Magistrate in the Judgment. This is pertinent, because, if indeed the 1st Complainant was 12 years old as of **26 November 2012** when the offence is said to have happened, then it would follow that the sentence passed on the Appellant was unwarranted, if not altogether illegal. Consequently, I have given the Appellant's submissions careful consideration. I however note that in *voir dire,* **PW1** was responding to specific questions put to her by the Learned Trial Magistrate, such as "How old are you?"; questions which had no reference to the incident. As has often been stated, the purpose of the *voir dire* examination is for the court to ascertain whether a child of tender years is possessed of sufficient intelligence to understand the meaning of the oath and the importance of being truthful. Thus, in **<u>Maripett Loonkomok vs. Republic [2015] eKLR</u>**, the Court of Appeal restated that:

> **"*Voir dire,* a latin phrase (*verum dicere*) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "*<u>Voir Dire</u>* <u>definition" Duhaime's Legal Dictionary</u>.".**

[28] *Voir dire* also serves another purpose, namely, to enable the court ascertain the age of the minor with a view of determining whether a minor is a child of tender years for purposes of **Section 19** of the **Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya**; granted that it is now trite that a child of tender years is one under the age of 14 years. In **<u>the Maripett Case</u>** (supra) it was held that:

> **Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of <u>Kibageny Arap Kolil v R (1959) EA 82</u> the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in <u>Patrick Kathurima v R,Criminal Appeal No.137 of 2014</u> and in <u>Samuel Warui Karimiv R Criminal Appeal No.16 of 2014</u> stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination..."**

[29] It is instructive therefore that the *voir dire* examination, in this instance, was conducted on **16 January 2015,** some 2 years after the incident took place. Clearly, **PW1** correctly stated that she was 12 years old and that she was then in Class 7, granted that her 13th birthday was yet ahead by some 7 months or so. In **<u>Hadson Ali Mwachongo vs. Republic [2016] eKLR,</u>** the Court of Appeal made it clear that:

> **"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."

[30] In the light of the foregoing, and in particular, the context in which the age of 12 years was given by **PW1** and understood by the trial court, it cannot be said that there is any discrepancy regarding the age of **PW1**. The fact remained that as at **26 November 2012** when the incident complained of happened, **PW1** was 10 years old and therefore a minor within the contemplation of **Section 8(2)** of the **Sexual Offences Act.**

[b] <u>On Penetration:</u>

[31] On whether penetration was proved to the requisite standard, the Learned Trial Magistrate believed the testimony of the 1st Complainant; which was that, while she was playing with her sister, **FC (PW2),** the Appellant called her to the kitchen, pulled her into the kitchen and defiled her. She testified that her mother was away in Uganda and therefore that she had nobody to confide in; not to mention that the Appellant had threatened her with harm if she divulged the information. The evidence of **PW1** was corroborated by the evidence of **PW7** and the P3 Form marked the **Prosecution's Exhibit No. 3** which confirmed that **PW1's** hymen was broken.

[32] The Appellant made heavy weather of the fact that no discharge or presence of epithelial cells were noted by **Dr. Kibet.** It is noteworthy, however, that the examination took place several days after the incident, which took place on **26 November 2012**. The possibility that **PW1** had cleaned herself up cannot be ruled out given the circumstances in which she found herself. It is therefore my finding that the lower court cannot be faulted for coming to the conclusion that, in the case of **PW1,** penetration was proved beyond reasonable doubt.

[c] <u>On the Inculpation of the Appellant</u>:

[33] On whether the defilement was perpetrated by the Appellant, the only eye-witness account was that of the Complainant herself; and whereas the Appellant took issue with the fact that **PW1** was the only eye witness, it is trite that a conviction can be based on the sole evidence of a minor victim, if the trial court is satisfied that the witness is truthful. The proviso to **Section 124** of the **Evidence Act** is explicit that:

> **"...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"**

[34] With the foregoing provision in mind, I have re-evaluated the evidence of **PW1.** She told the lower court that they were at home with **PW3** and the Appellant who was their herdsman; and therefore a person well known to her. There is no question of her being mistaken about the identity of the Appellant. Moreover, she further told the court that when the Appellant subjected her sister, **FC (PW3),** and a neighbour's child, **MC (PW2)**, to the same act of abuse, she caused the matter to be made known to **PW2's** mother; and that it was thereupon that action was promptly taken against the Appellant. The trial court believed **PW1,** and rightly so in my view**,** granted that there was ample corroboration of her testimony in the evidence of **PW4, PW5, PW6** and **PW7**. It is therefore not surprising that, in mitigation before the lower court, the Appellant contritely stated that:

"I ask the court to forgive me...I will not commit the offence again..."

[35] I am therefore satisfied that there was proof beyond reasonable doubt that the defilement of **PW1** was perpetrated by the Appellant and that his conviction for Count I was well founded. Accordingly, I find no basis for differing with the conclusion reached by the Learned Trial Magistrate.

[36] In respect of **PW2 and PW3,** there was credible evidence placed before the lower court to prove that they were minors. That **MC** was only 6 years old was adverted to by not only **PW2** herself, but also her mother, **PW5** as well as **Dr. Kibet (PW7)**, in whose estimation, the girl was about 6 years as at the time of the incident. **PW5** produced the Child Health Card for **PW2** and it was marked the **Prosecution's Exhibit No. 1.** It corroborates the evidence of **PW2** and **PW5** that the 2nd Complainant was born on **12 December 2006**. She was almost 6 years when the incident took place; and by the time she gave her evidence on **16 January 2015,** she was 9 years old as stated by her in her *voir dire*.

[37] Likewise, uncontroverted evidence was adduced by the Prosecution before the lower court by **PW1** and **PW4** to buttress the evidence of **FC (PW3),** that she was aged 5 years only as at **27 November 2012**. She too was examined by **Dr. Kibet** and, in her estimation, **PW3** was 5 years old at the time of her examination on **29 November 2012.** Her mother gave her date of birth as **13 May 2007**. She also produced **PW3**'s Child Health Card as an exhibit to augment her evidence. There is therefore no dispute that both **PW2** and **PW3** were under 11 years old as at **27 November 2012**; and therefore there is no doubt that they were minors for purposes of **Section 8** of the **Sexual Offences Act.**

[38] It was however the evidence of **PW7** that nothing was noted by **Dr. Kibet** that would indicate penetration of the genital organs of either **PW2** or **PW3**. The P3 Forms produced by **PW7** confirmed that their hymen was intact. Nevertheless, from their respective testimonies, which was corroborated by **PW1,** there was sufficient proof of indecent act involving them. For the same reasons stated herein above, I am satisfied that the indecent acts were perpetrated by the Appellant. Accordingly, the Learned Trial Magistrate rightly convicted the Appellant of the Charge of indecent act with a child as charged in Counts III and V on the basis of the Prosecution evidence.

[d] <u>A comment on the Charges as laid and the Sentences imposed by the trial court:</u>

[39] Having been convicted of the offence of defilement under **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**, as

charged in Count I, the Appellant was liable to the penalty provided for in **Subsection (2)**, which stipulates thus:

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

[40] It is plain therefore that, where the victim is aged eleven years or less, as was the case in this matter, the sentence is mandatory and it is life imprisonment. It is worth mentioning that it was inappropriate to charge the Appellant with substantive counts of defilement and indecent act with a child under **Section 11(1)** of the **Sexual Offences Act** because, to do so would amount to double jeopardy, granted that the particulars are in respect of the same facts. I note however that whereas this anomaly ought to have been corrected by way of amendment of the Charge Sheet, the Learned Trial Magistrate properly directed himself and acquitted the Appellant of those charges; and therefore no prejudice was visited on the Appellant. He was in fact received favourable treatment in that he was acquitted of Counts II, III and V when the result would have otherwise been a "No Finding" on those counts had they been presented as Alternative Charges; thereby opening the way for reconsideration thereon on appeal.

[41] In the result therefore, I am satisfied that the conviction of the Appellant for the offence of defilement contrary to **Section 8(1**) as read with **Section 8(2)** of the **Sexual Offences Act** in respect of Count I; and the offences of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** in respect of Counts IV and VI was based on sound evidence. I am further satisfied that the sentences imposed by the lower court were lawful. I would accordingly confirm the same and dismiss the Appellant's appeal, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF MAY 2019

OLGA SEWE

JUDGE