REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO.17 OF 2018

JOSEPH KIEMA PHILIP.....APPEALANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant was charged with the offence of Defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on 7th day of 2016 at about 1pm at Kitengela Township in Kajiado Country caused his penis to penetrate the vagina of JA, a child aged 14 years.

He was convicted after a full trial and sentenced to 20 years imprisonment. The appellant was aggrieved by the trial court's decision and elected to prosecute this appeal to challenge both conviction and sentence on the basis of written submissions on 6 grounds couched as follows:

> ***1. THAT, the learned trial Magistrate erred in law by convicting and sentencing the Appellant yet failed to find that his Constitutional rights to a fair trial under Article 50(g) and (h) were violated.***
>
> ***2. THAT, the learned trial Magistrate erred in law by convicting without sufficient proof as regards the age of the complainant.***
>
> ***3. THAT, the Learned Trial Magistrate erred in law by failing to find that the charges levelled against the Appellant were not proved to the required standard of reasonable doubt.***
>
> ***4. THAT, the admissibility of the medical document produced as exhibit by the prosecution was in doubt and did not meet the required standard as per Section 33 of the Evidence Act and article 50(4) of the Constitution.***
>
> ***5. THAT, the Learned Trial Magistrate erred both in law and in fact by convicting and sentencing the Appellant where no proper investigations were conducted and on the basis of a defective charge.***
>
> ***6. THAT, the Learned Trial Magistrate erred both in law and in fact by failing to consider the Appellant's truthful and plausible defence.***

Before I endeavor to delve into the merits of the Appeal it would be prudent to set out the brief summary of the case at the trial Court. The prosecution case is comprised of five (5) witnesses who tendered the following narratives. JA herein referred to as PW1 was the Complainant. Her birth certificate produced before the trial court denotes that she was born on 1st January 2003. In her evidence, she stated her family and the Appellant stays in the same building and that she was going to buy tomatoes when the Appellant called her and asked her to get into his house. According to her, she entered the Appellant's house out of respect and she had not contemplated that any bad intentions on the part of the Appellant.

She told the trial Court that when she entered the Appellant's house, he asked her if she had started having menstrual periods a question she claims to have declined to answer. The Appellant closed his door and pulled her to his bed. Even though she protested, he overpowered her, threw her on his bed, undressed her and proceeded to have sexual intercourse with her. Since she was screaming, the Appellant told her not to scream as neighbors would hear.

PW1 also asserted that after the ordeal, her cousin asked her what she had gone to do in the Appellant's house and she cheated her by saying that she was seeing the Appellant's wife. She also adduced evidence to the effect that she started feeling unwell and she was taken to the hospital on the 20th of December 2016 where she got treatment. She continued ailing and on 26th December she was examined by a doctor who found out that she was pregnant. That is when she was interrogated by her parents and she told them what the appellant had done to her. The appellant was arrested with help of the members of the public and taken to Kitengela Police Station. She was then taken to Nairobi

Women's Hospital Kitengela for medical examination as part of an investigation. She maintained her narrative upon cross examination.

PW2 and PW3, are the mother and the father of the complainant respectively. Their testimonies basically corroborates that of the PW1. They both alluded to the fact that the Complainant got unwell, they took her to the hospital where she was found to be pregnant. That is when they interrogated the minor and she told them that the Appellant was the author of her misfortune. The parents with the help of the members of the public arrested and took the Appellant to the Police Station where the Appellant was charged with the present offence. PW3 also alluded to the fact that he interrogated the Appellant on the way to the Police Station and the Appellant said that he made a mistake.

PW5 is the clinical officer, Mr Patrick Musyimi who examined the complainant and filled the Post Rape Care Form. He also filled the P3 form. His findings where that the minor was about six (6) weeks four (4) days pregnant. Upon examination of her genitalia, he found white discharge on her vagina, her hymen was broken and her anus was normal. He concluded that she had been involved in sexual intercourse. He produced the Medical Examination Report before court (Exb 3).

This case was investigated Sergeant Margaret Wanjira of Kitengela Police Station herein referred to as PW4. She was the one that charged the Appellant upon receipt of the PRC and P3 forms. His testimony was that in the course of investigation the pregnancy developed problems and it was therefore aborted.

I also noted that at the close of the prosecution, the Appellant was put on his Defence as DW1 pursuant to section 211 of the Criminal Procedure Code. He elected to give a sworn testimony. He introduced himself as a Pastor and that he also operated a boda tax business. He confirmed to have been taken to the Police Station by the complainant's parents and that is when he was told that he was responsible for the complainant's pregnancy.

He claimed that he was told that the case had no strong evidence and that he could be released upon payment of Ksh.30,000.00/- as bribe which he declined to pay. He also stated that he was taken to the hospital for tests. He claimed to have been having a grudge with the complainant's mother which stemmed from the fact that she was an elder in the church when the Appellant split and formed his church and moved away with some of the congregants. According to the DW1, this did not go well with PW2 and other members of the original church which resulted in her declaring that his church would not grow. He argues that the charges of defilement were meant to stop the work of God.

He also took an issue with the absence of the pregnancy at the hearing pointing out that it interfered with evidence.

ANALYSIS AND DETERMINATION.

As this a first Appeal, this court is required to re-evaluate the evidence tendered in the trial court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. The role of the Court of the first instance is well settled in the case of ***OKEMO VS. REPUBLIC (1977) EALR 32*** and further buttressed in the Court of Appeal decision in revisit the evidence tendered before the trial Court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter. This task must have regard to the fact that I never saw or heard the witnesses testify thus the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.

In the determination of the appeal at hand, this court is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences herein were proved. The issues for determination in this matter are as follows:

a) Whether or not the Appellant was not accorded a fair trial pursuant to article 50(g) and (h) of the constitution.

b) Whether or not the ingredient of age was proved to the required standard of proof beyond reasonable doubt.

c) Whether or not the medical report produced before the trial court was admissible.

d) Whether or not the charge sheet was defective, if so, whether the same is curable.

On the first issue, the Appellant contended that his rights guaranteed in Article 50 (g) and (h) of the Constitution of Kenya were violated by the trial court. In the respect, it was the Appellant's contention that the Learned Trial Magistrate failed to observe that he was a layperson or he was not well conversant with legal matters hence he ought to have been represented by an advocate. In other words, his argument is that his right to legal representation was violated. He argued that he was not informed of the right to legal representation and that the law mandates the court to inform an accused person of this right. He closed this argument by saying that substantial injustice was occasioned on him.

The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010. Relevant in this case is article 50(2) (b) (g) (h). The same provides as follows:

"50(2) every accused person has the right to a fair trial, which includes the right –

(g) To choose, and be represented by an advocate and to be informed of the right promptly.

(h) To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

Generally, article 50(2) (g) of the Constitution guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly. Perhaps at this juncture, it is noteworthy in the above context to venture into the provisions of the Legal Aid Act, 2016 which came into force on 10th May 2016.

The above mentioned act in its preamble states that, its focus is to "give effect to article 19(2), 48, 50(2) (g) and (h) of the constitution to facilitate access to justice and social justice." Section 43 of the Act lays down the duties of the court before which an unrepresented accused person is presented. The same provides as follows:

"A Court before which an unrepresented accused person is presented shall:

a) Promptly inform the accused of his or her right to legal representation;

b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and

c) Inform the service to provide legal aid to the accused person"

The key words under article 50(2) (g) and (h) of the Constitution and section 43 is "***to be informed promptly of the right".*** In order to fully comply with the dictates of article 50(2)(g) and (h) and section 43(1) of the Legal Aid Act ,trial courts as a matter of constitutional duty and the interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible. A determination must be made as to whether or not the accused person would require legal representation before commencing with the hearing of the case. The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings. The trial court is under a duty to look at the whole indictment and satisfy itself that substantial injustice will not be occasioned and that would inform the court's decision as regards whether or not to proceed to the hearing with an unrepresented accused person. If through the above scrutiny, the court finds that substantial injustice would be occasioned, it would then move from the provision under article 50(2) (g) to 50(2) (h) and make a finding and/or orders to the effect that a state funded counsel be provided to the accused person for not only justice to be done but for justice to be seen as having been done.

Where the trial court finds that substantial injustice would be occasioned if the accused person proceeds to the hearing of the matter unrepresented, the court must have an advocate assigned to the accused person by the state at its expense, and the court should or must once again inform the accused of this right promptly pursuant to article 50(2) (h) as read with section 43(1) (b) 0f the Legal Aid Act no. 6 of 2016.

It is instructive to note that the trial record of proceedings must indicate or communicate that the accused was duly made aware of his rights under article 50(2) of the constitution and that the process expounded above was conducted where it is relevant. The court is the custodian of law and ought to ensure that these constitutional safeguards are jealously protected and upheld at all times. Therefore it is incumbent upon the courts to ensure that the trial is judicious, fair, transparent and expeditious as well as ensuring compliance with the basic rule of law.

Back to substantive arguments, I now endeavor to examine the provisions of article 50(2) (h) of the constitution and section 43(1) (b) of the Legal Aid Act of 2016 which envisages the state funded legal representation. At this juncture, I shall also look at authorities from Kenya as well as other jurisdictions for jurisprudential guidance. In criminal matters, there is a very big distinction between an unrepresented and a represented accused person. This follows the logic that the adversarial system is so complex that an accused devoid of requisite legal skills may find it difficult to comprehend the trial proceedings.

However, the right as regards legal representation is not absolute and there are instances where the same can be limited. This was succinctly dealt with in this case of ***S V HALGRYN 2002, (2) SACR 211 ((SCA) PARAGRAPH 11***, Herms JA stated that:

"Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations."

A close reading to article 50(2) (h) of the constitution and section 43(1) (b) of the Legal Aid Act, 2016 on the right to legal representation divulge that an accused person's entitlement to legal representation at the expense of the state is not automatic but qualified. Thus, this right is not entitled to every accused person. It therefore appears from the above provisions of law that legal representation at the expense of the state is only available where there is likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. It is therefore incumbent upon the accused person to prove that unless he or she is assigned an advocate by the state, substantial injustice would occur.

"*Substantial injustice* "is not defined in the Constitution. Thus, there is no legal definition of the same. Neither does the constitution enumerate circumstances under which an accused person is entitled to a state funded Counsel. In an attempt to define the concept of substantial injustice, both local and foreign jurisprudence may provide guidance on the issue.

In the African Commission in ***ADVOCATS SANS FRONTIERS (ON BEHALF OF BWAMPANYE) V BURUNDI, AFRICAN COMMISSION ON HUMAN RIGHTS, COMM. NO. 213/99 (2000)*** it was observed that:

"…Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each

stage of the case…"

In the same respect, the United State Supreme Court in the Land Mark Decision of ***GIDEON V. WAINWRIGHT, 371 US 335 {1963},*** held that the noble ideal of fair trial before an impartial tribunal in which every defendant stands equal before the law, cannot be realised if the poor man charged with a crime has to face his accusers without a lawyer.

Further, in the most celebrated case of ***PETT V GREYHOUND RACING ASSOCIATION, (1968) 2 All E.R 545, at 549, Lord Denning succinctly*** stated that:

> ***"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"***

The South African Constitutional Court in the case of ***FRASER V ABSA BANK LIMITED, (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC)*** (15 December 2006) stated:

> ***"Without the recognition of the right to legal representation in*** *section 26(6)****, the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in*** *section 35(3)(f) of the Constitution* ***does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation. Financial constraints necessarily play a role and competing needs and demands have to be balanced. An accused also has the right to have a legal practitioner assigned at the state's expense in terms of*** *section 35(3) (g)* ***where substantial injustice would otherwise result, as acknowledged by the Supreme Court of Appeal. The extent to which this might be appropriate or sufficient in a particular case will depend on all relevant prevailing factors, including the complexity and seriousness of the criminal charges."***

In Kenya, this issue first came up for interpretation before the Court of Appeal in the case of ***Macharia v R***. The court after reviewing the past and current law stated that as follows:-

> ***"Art 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."***

In a more recent case of ***KARISA CHENGO & 2 OTHERS V R, CR NO.s 44, 45 & 76 OF 2014,*** it was stated:

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the*** *David Njoroge Macharia case (supra)* ***seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result? And to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."***

In view of the principles expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider in addition to the relevant provisions of the Legal Aid Act, various other factors which include: the serious or nature of the offence in question thus serious offences may attract public interest to the extent that the public may require some form of representation to be accorded to the accused person to conduct his own defence; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and or life imprisonment ;the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the court to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernible from the issues of fact and law which may not be comprehend by the accused.

In this matter, the appellant was convicted of the offence of defilement and sentenced to 20 years imprisonment. I have gone through the trial record and nowhere does it communicate whether or not the accused was informed of his rights under section 43 (1) of the Legal Aid Act and Article 50(2)(h) and (g) of the constitution regarding the right to legal representation. Furthermore, given that the accused was charged with an offence which carries a severe sentence of life imprisonment but however he was not accorded his right to legal representation as required by law. In that regard, there is substantial injustice unless represented.

The trial court ought to have at least informed him of this right. I therefore find that the appellant, according to section 41 of the Legal Aid Act is eligible to make the application to the National Legal Service Aid in person or through any other person authorized by him in writing. The mandatory duties imposed on trial courts by section 43(1) of the said Legal Act and article 50 of the constitution were therefore not complied with, and in the circumstances I find that the trial proceedings were conducted in a manner prejudicial to the appellant and caused grave injustice to the appellant. Such proceedings ought not to stand.

To add from the above determination, I'm of the view that the right to a fair trial runs through the whole trial process. It must be noted that Article 50 of the Constitution is a highly litigated area of law especially at Appeal level. Having said so, it is paramount that the record of the trial court should demonstrate that the rights enshrined under Article 50 of the constitution where accorded to the accused person were they are applicable. For instance, the record of the trial court must demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It must show that the court did take the profile of the accused person before the trial commenced and in doing that the trial court may look into, *inter alia*, the education level of the accused, it must inquire whether or not he understands or he is knowledgeable in legal matters as well as the trial process. Whether or not he understands the languages of the Court, that is English and Kiswahili and if not, the court must ensure that an interpreter has been appointed to aid the accused person in all matters of such kind. Where the a person does not afford an advocate or qualify to having one appointed at state expense, and the court is of the opinion that substantial injustice is likely to be occasioned considering the circumstances of each case, it may allow the accused person to have an intermediary of his choice who may be knowledgeable enough to speak on his behalf.

Further, as regards the issue of witness statements, the law under article 50(2) requires that an accused person be furnished with all the relevant information being used by the prosecution against him in order to enable him prepare his defence properly. I take judicial notice of the fact that most if not all the statements which are furnished with the defence in Kenya are written in English and no follow up is done to ensure that the accused understands those statements to the extent that he is able to frame his defence and that in my view works to the detriment of the accused person. I'm of the view that the record of the trial court must be able to show not only that the accused was furnished with all the material evidence that the prosecution relied on but also that he understood that evidence sufficiently well to enable him to challenge it. In the event that he doesn't understand the language used in framing the said evidence, an interpreter or mediator has to be appointed to ensure that the accused is not prejudiced by language barriers. The court also need to ensure that the accused has been given adequate facilities required to prepare his defence. All that which I have alluded to above must be indicated in the trial record to enable the Appellate courts to refer to it whenever those issues have arisen during appeal.

On the second issue, the Appellant argues that the age of the complainant was not proved to the required standard of proof beyond reasonable doubt. According to him, the charge sheet depicts the complainant's age to be 14 years which contradicts the evidence adduced in court by the other prosecution witnesses which put the minor's age at 12 years, hence the age of the complainant is in doubt. He further faulted the birth certificate which was produced before the trial Court saying that if does not bear any hand written part that could prove the eligibility of the document. In his view, the birth certificate looks like it's a forged document which in some parts is not clear apart from the mounted words (names) and to him this creates doubt as regards the genuineness of the document. Having said so he is of the position that section 33 of the Evidence Act was contravened.

The Appellant also pointed out that the evidence as regards age as depicted by the doctor's Post Rape Form dated 29th December 2016 shows that she was born of the 1st of January 2003 meaning that as at 29/12/2016 when the case was reported she was 13 years of age. In his view the evidence of the evidence tendered by the prosecution on this limp was questionable and not enough to sustain conviction. The Appellant placed his reliance on the case of ***JOHNSON MUIRURI VS REP (1983) KLR 445, Madam Porter JJ and Chesoni AG JA.*** Which basically talks about the importance of voire dire examination and he argued that the evidence of the Complainant even though she was deemed to be intelligent was doubtful.

The critical ingredients defilement are envisaged in the case of **CHARLES KARANI VS REPUBLIC, Criminal Appeal No. 72 of 2013** as follows:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the Sexual Offences Act a person is deemed to have committed defilement if he or she does an act which causes penetration ***with a child.*** Under Section 2 (1) of the Sexual Offences Act, the definition of a child is the one assigned in the Children Act. This entails any human being of less that eighteen (18) years. The onus of proving age resides with the prosecution. ***Mwilu J (as she then was) in the case of HILLARY NYONGESA VS REPUBLIC (Eldoret Criminal Appeal No.123 of 2000)*** stated that:

> ***"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved….And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***

Similarly, in **KAINGU ELIAS KASOMO VS REPUBLIC; Malindi Court of Appeal Criminal Case No. 504 of 2010**, ***the court emphasized on the importance of proving the age of the victim of defilement as the sentence imposed upon conviction depend on the victim's age.***

The question to ponder as to how the age of a complainant can be proved to the standard required by the law. In the circumstances, I'm guided by the case of **JOSEPH KIETI SEET VS REPUPLIC (2014) eKLR**, H.C at Machakos, Criminal Appeal No. 91 of 2011, the Learned Mutende, J Held as follows;

> *It is trite law that the age of the victim can be determined by medical evidence and other cogent evidence. In* ***Francis Omuroni –Vs-Uganda, Court of Appeal No.2 of 2000,*** *it was held thus:*
>
> > *In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense……"*

In the same respect, the Sexual Offences Act promulgated some rules towards the achievement of its objectives which came into force on

11th/07/2014 under legal notice no.101. By dint of Rule 4 of the Sexual Offences (Rules of Court) 2014, it is provided 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."*

Under section 2 of the Children Act, "age" is defined as;

> ***"Where actual age is not known means apparent age"***

Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the Sexual offences Act. Furthermore, in the case of Evans Wamalwa Simiyu Vs. R (2016) eKLR, the Court observed that;

> *"As whether the complainant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was 12years, she did not explain the source of this information. The complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Doctor Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the doctor does not appear to have carried out a specific age assessment. Nevertheless we do note that under Part C of the P3 form the age required is estimated age and under Children Act "age" where actual age is not known means apparent age. This means that in the Doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."*

In that regard, the court in the above cited portion of the decision agreed or considered the minor's age to be proved by the apparent age provided by the P3 form. I have gone through the evidence on record in respect of the instant case, the mother, father and the complainant as well as the Medical Examination Report dated 30th/12/2016 shows that the complainant was aged 13 at the time she was defiled. A Birth Certificate was produced by the mother of the complainant in support of the evidence they adduced in court. The said Birth Certificate shows that the Complainant was born on the 1st of January 2003 thus at the time she was defiled in December 2016, she was 13 years of age. The accused in this respect faulted the said Birth Certificate saying that it is a forged document but in my view he failed to tender evidence as regards forgery hence this Court finds that the actual age of the minor was 13 at the time the crime was occasioned on her. The Appellant's argument in the respect is hereby dismissed.

The appellant has also taken an issue regarding the allegation that he impregnated the complainant. He contended that the prosecution witnesses adduced evidence to the effect that the pregnancy was as a result of an act of defilement committed on 6-7 th day of December or during the month of December while the evidence of the Doctor who examined the complainant estimated that the pregnancy was about 4 weeks and 4 days old hence his argument is that the complainant was impregnated earlier than the month of December 2016 and someone else other than the accused person impregnated her. He therefore cited the well-known Landmark case of **WOOLMINGTON VS DPP (1935) AC 462** which states that if there is any doubt created by the evidence brought forward by the prosecution, then the case for the prosecution is not proved and the prisoner is entitled to an acquittal. He further challenged the explanations given by the prosecution witnesses as regards reasons why the pregnancy was aborted, that is the fact that the father alluded to the fact that the pregnancy was aborted because the child was seriously ill as she had tried to abort the pregnancy, a fact that the mother and the complainant did not mention in court. They simply said that the pregnancy was aborted because it had developed some complications. He further argued that there lack paper work in form of an official report regarding the abortion. In his view, the question of pregnancy was paramount to his case as the same establishes the link and shed light that indeed he was responsible for the heinous act. He was also of the view that the child was only sick and the issues as regards pregnancy where trumped up to form the basis of the prosecution case.

It is indeed true from the evidence on record that there is an allegation that the complainant was impregnated by the Appellant. The Doctor's report supports that assertion as well as the evidence tendered by all prosecution witness. The Medical Examination Report is of much importance on this limp,

As regards the issue of defective charges, the Appellant argued that the prosecution evidence was not consistent with the charge sheet. He referred this court to the case of **JASON AKUMU YONGO VS REPUBLIC CR APP NO.1 OF 1983 PG.3** where the court held that:

> **"In our opinion a charge is defective under Section 214 (1) of the criminal procedure code where:**
>
> **a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses: or**
>
> **b. It does not, for such reasons, accord with the evidence given at the trial: or**
>
> **c. It gives a misdescription of the alleged offence in it particulars."**

He therefore humbly begged the court to agree with his contention that the evidence of all the witnesses is not consistent with the charge sheet and that renders it defective. He further cited the case of **BURUNYI AND ANOTHER VS UGANDA 1968 E.A 123 BY SIR UDO UDOMA CJ** where the court held that it is not the duty of the court to stage manage a case for the prosecution nor is it the duty of the court to endeavor to make a case against the accused where there is none. He also alluded to the fact that the case is on appeal and the prosecution at this stage cannot be ordered to amend the charge sheet and neither can the case be taken to the trial court for purposes of amendment of the charge sheet as section 214 clearly states that amendment of the charge can only be done before closure of the prosecution case or the whole

case be nullified and order a retrial. He quoted the decision in **AHMED SUMMAR VS REPUBLIC (1964) E.A 48 PG.483** where it was held that it is true that where a conviction is vitiated by a gap in the evidence or defect for which prosecution is to blame the court will not order a retrial. In that regard the Appellant contended that the defectiveness of the charge cannot be cured under section 382 of the CPC since his rights fundamental rights under article 50 (2) (b) that is the guaranteed right to a fair hearing which includes the right to be informed of the charge with sufficient detail to answer it were violated.

The accused further relied on the case of **MAINA-VS-REPUBLIC (1970) EAC 370 & HENRY MAURINYO VS REPUBLIC 150/153** where the position of the court was that people can frame others for in case of alleged sexual offences. It is really dangerous to convict on evidence of a woman or a girl alone and this is because human experience has shown that girls and women sometimes tell an entire false story which is very easy to falsify.

Section 137 (f) of the Criminal Procedure Code on rules for the framing of charges and informations provides as follows:

> *"f. General rule as to description.—subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, matter, actor omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to;"*

The question as to what constitutes a defective charge sheet was spelt out in the case of **YOSEFU AND ANOTHER -VS- UGANDA (1960) E.A., 236**. The East Africa Court of Appeal held:-

> ***"The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act."***

And in **SIGILANI -VS- REPUBLIC (2004) 2 KLR, 480**, it was held that:-

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

On the other hand, Section 134 of the Criminal Procedure Code provides for what the components/ingredients of the charge sheet constitute as follows:-

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

The underlying principle governing charge sheets is that an accused person ought to be charged with an offence known or recognized in law. The offence that the accused is charged with must be disclosed and stated in clear terms and unambiguous manner so as to enable the accused plead to a specific charge in which he understands. This enables the accused in preparation of his defence. The Appellant has not demonstrated how exactly the charge sheet is defective. His argument is that the evidence tendered by the prosecution was inconsistent with the charge hence it is defective. This cannot in law constitute a defective charge sheet. Despite that, there is no question in my mind that the appellant clearly understood the charges facing him (to wit, defilement) well enough to understand the ingredients of the crime charged so that he could fashion his defence. The particulars of the offence were properly and clearly spelt out in the charge sheet which captures the date the offence was committed, the place it took place, the act that constitute the alleged offence and the names of the victim and that of the Appellant. This in my view, he understood it well enough to offer an explanation when the facts were read out to him.

To tie up, even though the trial court proceedings have been found to have been done in total breach of the appellant's fundamental rights to a fair trial, it must be noted at this juncture that there exist an inescapable tension in relation to the three main competing interests. It is equally important that the interest of the society through the instrument of the state, to punish crime; the need to ensure rights and inherent dignity of the offender are protected and lastly to ensure that the victim of crime or the complainant goes with a remedy where it's in the premises, regardless of the violations of the rights of the appellant, I shall not acquit him for the purposes of safeguarding the interests of the other two concerned parties.

I observe that the learned magistrate did not comply with the provision of article 50 on the right to a fair trial. As such I find the proceeding were defective and did prejudice the appellant and appropriate steps ought to be taken to ensure a fair hearing at his trial. In the circumstances, and in terms of the interest of justice this court directs that a retrial be held by another magistrate besides the one who presided over the original trial.

Accordingly the appellant be produced before the Chief Magistrate at Kajiado on 16th may 2019 for further directions.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 3RD DAY OF MAY, 2019.

R. NYAKUNDI

JUDGE

Representation:

Mr. Meroka for DPP

Appellant