



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 224 OF 2017

RICHARD KIYAL.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 1009 of 2015 delivered on the 4th day of December, 2017 by Hon. R. Yator, SRM]

JUDGMENT

1. The appellant was on 4th December 2017 convicted and sentenced to imprisonment for 20 years for the offence of defilement contrary to section 8 (1) as read with 8 (3) of the sexual offences Act, the particulars of which were that he had “on the 6th day of October 2015 at [particulars withheld] township in Koibatek Sub-county within Baringo County committed an act which caused penetration of his penis into the vagina/anus of M.J a child aged 14 years.”
2. The appellant challenged the decision of the trial court on the following grounds of appeal:

“AMENDED GROUNDS OF APPEAL IN ACCORDANCE TO SECTION 350 (2) (V) CPC

My lord the trial Court erred both in laws and facts when it convicted me on the prosecution case and failed to consider the following.

Grounds

1. That, Age of the alleged girl was not proved by credible evidence.
2. That, No act of defilement on the substance of the charge and the circumstance of case hardly picture the same.
3. Fatal variance between particulars of the charge and evidence tendered, Names of the complainant are defective.
4. Medical Evidence is not sufficiently proving defilement on sound evidence, the findings of examination are shoddy.
5. Appellant was not forensically and scientifically linked-up as required under section 26/36 Sexually Offences Act No. 3/2006.
6. The Sentence was inconsistent to the mitigating factors and Sentencing Policy Guidelines 2016.
7. Relying Authority Martin Charo –VS- REP [2015] APP No. 32 Malindi HCA.”

3. The appellant further filed written submissions corresponding to his grounds of appeal as follows:

“WRITTEN SUBMISSION IN ACCORDANCE TO AMENDED GROUNDS

GROUND ONE: AGE OF THE ALLEGED MINOR NOT PROVED AT ALL:

My lord defilement should be established when the age of the minority is below under the age bracket of below 18 years. In these case my lord the age of the alleged victim was not established by credible evidence, it's a backdrop of figures here which has no

evidential value whatsoever.

My lord the alleged child health card – MFI is not existing and was not identified before. The evidence concerning the exhibit is pure fraud. See page 22 line 16 – 19.....“I was born on 19th December 2001 and I have my child health care (reads) D.O.B 9/12/2001 in names M C and mother is R= K= and father KJ which are names of my parents - Child Health Card – MFI 1....”

Where is the documents in these proceedings? My lord observe that the document where the girl was reading from was not identified by the Court and the alleged purported father (Pw2). Secondly the father (Pw2) did not identify the alleged non-existing child health card. Thus my lord” Unidentified exhibit destroys judgment”

See JOSEPH NJARAMBI KARURA (1988) KLR.

The names from the purported document as names of the father “K J” are inconsistent the names of the person who testified (Pw2) “J K S” of merits. Therefore the true age of the complainant is not known. Naked evidence holds no water. Defilement under section 8 (1) (3) SOA No. 3/2006 was not established by sound evidence. Allow my lord this appeal on these simple ground.

GROUND TWO: NO ACT OF DEFILEMENT

My lord both on the charge particulars and evidence tendered did the prosecution stated that the accused did anything illegal or unlawful on the alleged girl. The charges were not drafter in accordance to section 43 (1) SOA No. 3/2006. First the words “Intentional” and “Unlawful” were omitted on the particulars of the charge, therefore the alleged penetration was not declared unlawful.

My lord nowhere did the minor complained to have been forced to the trap of the accused. The child as alleged was sent to school instead defected or sneaked to another place whereby she intended to travel to Eldoret.

Page 20 lines 6 – 7, 9 – 10, 13 – 14.

“...The following day I went to school then I went where he was at a route used by motorbikes and did not see him there “...I was not going to school and shortly”...we boarded it and it came to Nakuru...We boarded it and it came to Eldama Ravine.....”

My lord from the above sentiments its evident that the girl knew what she was doing and where she was going. My lord let it be observed that the girl’s uniforms were not brought as exhibits. I strongly content that the girl is not school-going since nothing proves that she is a pupil at [particulars withheld] and she was absent on the material day. No proof at all.

In this argument my lord I rely on the case of MARTIN CHARO –VS- REP [2015] APP. NO. 32 at Malindi held “...circumstances have changed children love sex and adults should not be overloaded.....” Charo was acquitted. On the context my lord the circumstance hardly picture that somebody was defiled SEE. Pg. 22 line 14 – 15...”I felt pain on my vagina and I did not bleed.....” This is a redherring evidence and should not be accommodated as a basis of conviction. The trial Court was substantially wrong in finding me guilty.

GROUND THREE: VARIANCE BETWEEN PARTICULARS OF THE OFFENCE AND EVIDENCE/DEFECTIVE CHARGE SHEET

My lord the particulars of the charge reads on part.

“RICHARD KIYAI...committed an act which caused penetration of his penis into the vagina/anus of MJ a child aged 14 years...”

During my trial, the witness who was brought as the complainant was named as (MC) pg 18 line 16. My lord its my considered contention that the person who was alleged defiled in respect to the particulars of the charge named by initials M.J is not the person who was availed at trial to testify named as (M.C) who is MJ On the charge-sheet? Why is the prosecution withholding the alleged name of the alleged complainant?

The person who testified as the complainant did not identify herself as “MJ” what irony my lord?

The name of the complainant as depicted on the charge is misleading and thus fundamentally and materially prejudiced my trial. My lord by availing a witness with different names from those of the changes was enough to lender this whole trial fatally defective beyond salvage. The defect my lord is incurable under provisions of law under section 382 of the Criminal Procedure Code.

I further contend that there was great need to amend the charges as required under section 214 of the criminal proceedings and rectify the anomaly or defect. When the trial went silent and assumed that “M.J” was defiled and was represented by “MC” on trial was a malpractice which should be ruled against them and acquitted accused on the charges levelled on the particulars. At this end the whole proceedings is nullity. Furthermore nothing was disclosed on particulars which was un-lawful or illegal. I urge the Honourable Court to allow this appeal on this premise.

GROUND FOUR: MEDICAL EVIDENCE DID NOT SUFFICIENTLY PROVE DEFILEMENT ON SOUND EVIDENCE

My lord here is an important for evaluation, its allegation that the girl was an under age 14/15 years old, the offence was brought

before the authorities and examinations done the following day. On page 46 Pw6 made the following observations bide lines 1 – 5

“...Her body was normal on examination and her private parts examination (labia majora was normal labia minora had bruises. Hymen was broken anal areas were normal and she had whitish discharge and no blood and no obvious signs of infection urinalysis was normal...”

My lord where is blood if at all hymen was broken? When was this hymen broken? No blood? Some hours ago? My lord wasikundanganye, Red herring evidence. The trial failed to find weakness on prosecution case and give the appellant benefit of doubts.

GROUND FIVE: SECTION 26 AND 36 OF THE SEXUAL OFFENCES ACT NO. 3/2006 WAS NOT COMPLIED AS REQUIRED

My lord the whitish discharge which the prosecution anchored as a basis of conviction did not link the appellant squarely to offence was required under section 26 and 36 whereby the prosecution were required to collect the alleged samples believed to be spermatozoa. SEE SECTION 36 (1) (2) (3) (4).

It's a trite law in our Criminal Jurisdiction the burden of proof should be upon the prosecution on all costs and never shifts to the defence. The prosecution case is weak. May this Honourable Court quash these conviction and sentence following in sufficiency of evidence as required under sexual offence Act No. 3/2006.

GROUND SIX: THE SENTENCE WAS INCONSISTENT TO THE 2016 SENTENCING POLICY GUIDELINES 2016

My lord the published laws by the Kenya Judiciary provides a four tier methodology for determination of a custodial sentence. The starting point being mitigating circumstances. That would lessen the term of the custodial sentence.

My lord may this Honourable Court of justice invoke the aforesaid provisions of law and those enshrined under section 354 of the Criminal Procedure Code, exercise its judicial discretionally powers and acquitted the appellant pursuant to the failure of the trial Court to consider the mitigation after the conviction. The trial was biased to impose the statute sentence under the circumstances. Further my lord through directions of the Supreme Court under Article 163 (7) it had held in the Authority in Francis Muruatetu – vs- Rep Petition 15/2017 that mitigating factors are paramount in sentence and resentencing. My lord let my mitigation be considered.

REASONS WHEREOF

I pray that may my appeal be allowed conviction quashed sentence set aside and set me free at liberty.”

4. The DPP opposed the appeal in oral submissions before the court as follows:

“Appellant

I have written submissions.

I rely on the submissions wholly without anything to add.

DPP

Appeal is opposed.

Appellant convicted of defilement contrary to section 8 (1) (3) of Sexual Offence Act and sentenced to serve 20 years imprisonment.

Complainant, Pw1 was a class five pupil aged 14 years at the time of the offences per the child Health Card that indicated that she was born on 9/12/2001.

She narrated how the appellant tricked her by promising her that he would take her to the better school than the one she was attending.

On 6/10/15, Pw1 pretended that she was going to school and instead went and met the appellant as they had agreed the previous day.

Appellant took her to Nakuru from Elburgon where he lived and then to Eldama Ravine.

Appellant then took Pw1 who was still in uniform to a shop where he bought her a shirt and shoes and asked the shop-keeper for a place where she could change.

Pw1 removed the uniform and wore the other clothes putting the uniform in a complainant bag.

Appellant then took the complainant to a hotel in Eldama-Ravine and booked a room. The appellant had left the complainant in the room and went out.

Pw3 the owner of the hotel had noticed that the complainant was a minor and she went into the room and interrogated the complainant. The complainant told her that the appellant was her uncle, as that is what she had been advised by the appellant to say in case anybody asked. Pw3 then advised the complainant not to share a room with the uncle and to ask him to pay for another room. Pw3 then informed one of the employee who was a watchman not to allow the appellant and the complainant to share a room.

Shortly, thereafter the appellant came and he was told by the complainant what Pw3 had advised her and he said he had no money for an extra room and he locked himself and the complainant in that room which was room no. 13.

The appellant proceeded to defile the complainant from the vagina and also from the anus. This was confirmed by Pw6 the doctor who examined the complainant. He testified that on examination, the labia minora had bruises, hymen was broken and the anus had internal tears. The doctor concluded that the complainant was sexually assaulted in both her vagina and anal organs.

Pw3 then asked the employees to call the police when the appellant locked himself with the complainant in the room. 2 Police Officers arrived and when they entered the room after the appellant opened the door the complainant was lying on the bed. She was wearing civilian clothes and a bag that had school uniform was on the table.

On interrogation the appellant said he was taking the complaint to her sister who is married in Sigoror.

In his defence, the appellant stated that he was in the company of the complainant's uncle and they were heading to the complainant's home. He did not call the said uncle as a witness and this contradicted the first report to the police.

Evidence against appellant is overwhelming. He did a lot of effort to take complainant from Elburgon, to Nakuru then to Eldama Ravine where he defiled her. He was found red-handed in a lodging. They were one the 2 of them and the medical evidence confirmed that the complainant had been defiled.

20 years is the minimum sentence for the offence.

Appellant in reply

I have nothing to add. I rely on the submissions.”

Analysis of Evidence

5. The question before the court is whether the offence of defilement and or the indecent act charged in the alternative has been proved against the appellant, and as a first appellate court, this court is entitled to reevaluate the evidence presented before the trial court and make its own conclusion before considering whether the decision of the trial court is to be upheld or quashed. See *Okeno v. R* (1972) EA 32.

6. The complainant minor PW1 detailed the allegation of defilement in unsworn evidence pursuant to an order of the court upon a *voire dire* as follows:

“PW1 – M.C

We used to reside in [particulars withheld] in 2015 and currently reside in [particulars withheld] in Solai area. In [particulars withheld] I used to reside with my father and mother and at that time I was at [particulars withheld] School in class five. At the moment I am at [particulars withheld] in class six.

On 5th October, 2015 Richard (accused pointed out) on a Tuesday the accused told me to prepare so we go to Eldama Ravine. He told me I pretend as if I am going to school on Tuesday 6th October, 2015 then I go meet him on the way. He had first told me we go to Eldoret. The following day I went to school then I went down to where he was he was at a route used by motorbikes and I did not see him there and I met my class mates M and C and they asked me where I was going to around 7.00 am and I told them I was waiting for someone and I was not going to school and shortly accused emerged and my class mates had not gone far. Richard told me to use a separated route (foot path) so we are not seen and he went up to a place there is a railway and we came up to the road and he said we wait for a vehicle to come and we boarded a Nissan up to Nakuru and he said we board another vehicle and we boarded it and it came to Eldama when I read the name at stage and he told me we alight so he goes buy me other clothes as I had uniform and he bought me a skirt, a shirt and shoes and he told the shopkeeper he gets me a place to change so he keeps the clothes in a paper bag. He then took me to a chair near the stage and he went round while talking on phone to someone I did not know. He then came but still left me behind without telling me why and later he told me he takes me to a hotel to buy me food and he bought me ugali and meat a hotel in Ravine after which we went to another hotel where he bought me tea and he went outside after taking tea and told me he was going to look for a place to sleep as we could not make it to Eldoret and it was already 7:00 pm. He came to call me saying he had found a place to sleep and we entered into a room and he told me to put the uniform on top of a table and he went outside asking me to rest on the bed and a certain woman came and told me that if accused returns he will advise him to rent another room. He had told me if I am asked who he is I say he is brother to my mother and father. Richard came but the woman did not come and I told him I had been advised he looks for another room and he said he will not and he then switched off the lights. The room had one bed and he came to the bed where I was asleep and removed my pant and did bad manners to me. I did not look at him whether he removed my pant and did bad manners to me. I did not look at him whether he removed any clothes as he had switched off the lights. We had sex with him and I could not tell if he wore any condom and he was on top of me while I lied on my

back. I wanted to scream and someone knocked the door and Richard went to open the door and I had covered my head and I was uncovered the face by someone and I saw two men and the accused had been handcuffed and they asked me if I knew telephone contacts for my parents and I told them I did not know. They had civilian clothes. When the door was knocked I had already put on my pant. They asked me to take my clothes (uniform on table) and they took us to the police and on arrival the accused was asked who I was and said I was J's child who is my father and he was asked of my parent's phone contacts and he told Police to check on his phone and they called my father and the Police asked him if he knew where I was and he said he did not know and Police told him to come for me the following day at the station. We then boarded vehicle same night and was taken to the hospital and accused was also taken and both of us were examined separately and I was told I was not infected and told to return the following morning for medicine and we returned to the station and locked in separately. My father came the following day and he asked how I get here and I told him Richard brought me there and I still spent in police second night and I was returned to hospital and following day we came to Court and given another date. The accused is my neighbor and had stayed for several months and he was a visitor there at a neighbor's place where he was herding cattle. He inserted his penis into my anus and vagina and I felt pain on my vagina and I did not bleed.

I was born on 9th December, 2001 and I have my child health card (reads) D.O.B 9/12/2001 in names MC and mother is RK and father KJ which are names of my parents.

- Child health card – MFI 1.

- The pant was wearing is the one in Court (MFI 2) and the one I gave to police while at hospital it was not stained.

- He bought me a navy blue jeans skirt – MFI – 3

- Green stripped blouse – MFI 4

- Sports shoes – MFI 5

I was taken to Eldama Ravine District Hospital was taken by Police and cannot recall if they recorded my documents. I have never heard accused disagree with our parents and he is before Court and is sat behind where I am. He had never done that before.

Cross examination by accused

I did not tell you I was going to my grandmother's place. We were found inside a lodging. I slept with you and you defiled me.

Re-examination

Nil

7. PW2, the complainant's father JKS testified as follows:

“PW2

I come from [particulars withheld] in Elburgon and I am a peasant farmer. In 2015 I was residing in Lawina. MC is my child who I was residing with. I know the accused who used to work for my neighbor and had worked for close to a month after coming from another person's place where we worked and I had known him. On 6th October, 2015 MC woke up in the morning and left for school around 6.30 am at [particulars withheld] and second child at ECDD went around 7.40 am and I went at 8.00 am for work at [particulars withheld] where I worked up to 5.00 pm and at the Centre I brought flour for the children and before I left Centre I received a text message from my wife telling me that MC did not come for lunch and had not yet arrived home. I went home and inquired and asked the other children and said they had not seen her. I returned to the Centre and I did not get her and I thought she could have attended a funeral at the neighborhood. Around 8.00 pm I received a text “I tried calling you” and it was a new number and I called back and the caller said he was a police officer at Ravine station asking if I knew MC and I told him yes it was my daughter and he told me I go the following day to the station as my child was there and did not tell me why and I went the following day of 7th October, 2015 and on arrival I saw my child I talked with officer and on entering inside the officer told me someone had taken and they entered cells and got accused outside and said he was with her and I talked with the child and she looked like she was in pain and fear and I did not talk with her. I found the child with civilian clothes which I had never seen her with as I knew she had put on uniform and left for school with her books and she told me accused had brought her the clothes and she had put uniform in her school bag. That he took her to the lodging and he defiled her and officers arrived a while inside and that she did not know them at first and was arrested and was asked of my contacts and said she did not know. The person who knew my contacts was accused as there was a time he got my contacts from my brother. My child did not know my contacts as she never used my phone. The child had already been taken to hospital by Police and they had medical documents. My child was born on 9th December, 2001 as per and the mother is R K and **my names registered as JK and names of child taken were MC but it's a typographical error as she is MC**. The skirt and blouse she was wearing at station are the ones in Court MFI 3, 4 and 5 respectively. I had never disagreed with accused nor his employer.

Cross examination by accused

I did not talk with child when she left in the morning and did not tell me she was going to her grandmother and I did not talk with her.

Re-examination

When the child left in the morning she was wearing her uniform, school bag and sandals and she was going to school and not grandmother's place."

8. PW3, the owner of the lodging house where the complainant was allegedly found with the complainant testified as follows:

"PW3

I come from [particulars withheld] town and I am a business lady with a shop and rental houses. On 6th October, 2015 I do recall one man came to look for a sleep around 4.00 pm – 5.00 pm and I told him the in-charge of houses was not yet around and he found me at the front in the shops and I told him I can show him room to put his luggage as he waits for me to call him. He then left behind the luggage and left and on returning I saw him come with a bag and a girl shortly and was not more than 30 minutes and the lady was still young who looked around 12 years and the room was opened for them and I got suspicious that she was young. He then left the girl behind in the room and he left and I went to room to interrogate child where she came from and she was saying either from Molo or Kabarnet and was hesitating and I asked who the person she was with was and said he was her uncle and were heading to Eldoret and had become already night and that she was being taken to school at her sister's place and I saw that she was wearing uniform inside and on top were civilian clothes which were new. I then advised her not to sleep in same room with the uncle and that she insists he takes a separate room. My employee who guards behind one Philip came and I told her that there was someone with a young girl and that they do not spent in same room and that if they do not pay separate he does not give them any room.

Shortly the accused came and they locked themselves in room No. 13 and I told Philip to make report and call the Police so to rescue the child. He then called and two officers arrived and from there I do not know what happened and I went back to my job and the two were escorted and I never followed up later until yesterday when I summoned. The suspect I saw at that he looks like the one in the dock and he is the one and I never used to know him before. The child told me their home was either Molo or Njoro or Kabarnet and was in fear. She was wearing dirty uniform which was longer than the new clothes she was wearing on top. The uniform was blue in colour.

9. The arresting officer, PW4 testified as follows:

PW4

We left with PC Bitinyu to the Murenyu lodge and on knocking the door it was opened and we headed to room No. 13 where suspect had boarded and we found him inside with the girl and the girl had a bag with school uniform though we did not know for which school and we talked with the suspect who said he was taking the girl to the sister. We found suspect standing at the door while the girl was sleeping on the bed. We then arrested the accused and escorted him to the station so as she is taken to hospital for examination and the Investigating Officer dealt with further investigations. The suspect and child were in the same room No. 13 and the suspect is the one in Court and whom I never used to know before. The suspect was saying he was taking the girl to the sister married in Sigoro. The bag had uniform inside and suspected she must have been picked from school. We found the girl was asleep on top of the bed with civilian clothes.

10. The investigating officer, PW5, testified as follows:

PW5

The following evening the parents came and P3 form filled and brought in the child's health card indicating she was born on 9th December, 2001 and parents are KJ and R K– MFI 1 Pex 1.

When suspect was arrested he had a receipt for boarding room No. 3 Murenju lodge and I saw receipt of 6th October, 2015 – MFI – 6 Pexb6.

When I took child to hospital I recovered her pant which was stained – MFI 2 – Pexb2.

There were clothes complainant was brought to as to remove school uniforms and were a blouse, jeans skirt and pair of sports shoes are the ones in Court – Pexb 4, Pexb 3, Pexb 5 respectively produced. The suspect/accused is the one in Court (pointing out in the dock) and I never used to know him before."

11. PW6, the examining doctor testified on his findings as follows:

"PW6

Her medical body was normal on examination and on private parts examination labia majora was normal, labia minora had bruises, hymen was broken anal areas were normal and she had whitish discharge and no blood and no obvious signs of infection. Urinalysis was normal high vagina swab showed spermatozoa and rest of the tests including syphilis and HIV were negative.

Anus showed internal tears. The doctor remarked she showed to have been sexually assaulted with both vaginal and anal penetration and degree of injury graded as grievous harm. The approximate age of injuries were hours same is signed and dated 7th

October, 2015 and wish to produce P3 form as MFI 7 – pexb 7.”

12. When put on his defence, the appellant gave an unsworn statement as follows:

“**DW1**

*I come from Sirwa and I was a shamba boy. On 6th October, 2015 I was in Elburgon and was to go home in Sirwa and the complainant I had agreed with her father and uncle that we shall go to her grandmother in Kapaio and leave with that child and her uncle WC from Elburgon and on arrival at Ravine at 1:30 pm and we got into vision hotel and took lunch after which we left and there is a lodging called Murenju and there was a bench and we left the girl sat at the bench outside the lodging and we left and I was going to repair my phone as the uncle went to drink alcohol and I left phone and I found him at the bus where he bought me soda. I then went to check if phone was already repaired and I went back and did not find the uncle at the bench and shortly a man in civilian came and asked me who I was with and **I told her a girl I was travelling with and he said he was an officer and he found us sat with the girl at the bench in Murenju and told him in fact the uncle was coming and he handcuffed me saying he had been given report to arrest me and I told him we wait for the uncle and he refused demanding Kshs. 10,000 so to release me and he called for a vehicle which came with three officers and CPI Bitinyu arrested me. They took me to the station and I was having bag for the uncle and he brought it till station and the girl was asked if her father's cell phone number which she didn't have and I gave them the number and we stayed till 7:00 pm and father did not come. We were taken to hospital where she was examined while I was not examined.”***

Determination

13. By the accounts of the prosecution witnesses, the complainant PW1, her father PW2, the owner of the lodging house PW3, and the arresting officer PW4, the appellant was arrested from the room where he had locked himself with the child complainant (Pw1). Pw1 narrated how the appellant had defiled her by sexual intercourse through the vagina and anus. The Clinical Officer (Pw6) produced medical evidence that supported the complainant's evidence of sexual intercourse. The appellant's defence agreed that he was with the complainant at the lodging room but alleged that he was travelling with the girl and the uncle. Weighing the evidence of the prosecution witnesses that the appellant had been arrested on tip-off by members of the public at the lodging and the complainant's own testimony that she had been sexually assaulted by the appellant, against the appellant's defence, I find the prosecution case proved beyond reasonable doubt as to the sexual intercourse with the complainant.

14. The prosecution only failed in proving the exact age of the complainant. No explanation was given for the production of a clinic card in name of MJ allegedly born on 9/12/01 to parents RK and K while the father of the complainant gave his name as JKS. In addition, as observed, the clinic card details, indicate that the child was born on 9/12/01 while she is shown to have been fully minimized 9 months after birth on 4/10/01, which two months before the date of birth which Pw1 and her father alleged as her date of birth. The clinic card is obviously fraudulent, and I reject it as evidence of the age of the child. Absent the clinic card, there is no evidence of age of the complainant because, the complainant (Pw1) and the father (Pw2) and the Investigating Officer, Pw5, had all relied on the clinic card. There was no independent evidence of age such as the Court could rely to establish the fact of age of the complainant in the absence of the valid birth certificate or clinic card or such document.

15. As the age of the complainant was not ascertained, the offence of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act could be proved. The complainant could well have been over the age 15 which would place the age under section 8 (1) (4) of the Sexual Offences Act which called for less severe penalty. This doubt as to the age of the complainant must be given to the benefit of the appellant.

16. However, there was no dispute as to the fact that the complainant was a child within the meaning of the Sexual Offences Act. The trial Magistrate in conducting the *voire dire* of the child before allowing her to give evidence found, and this Court is on the principle of ***Okeno v. R*** (1972) EA 32 required to defer to the trial Court, - that she was a minor:

“I do note that the minor does not possess intelligence of Oath taking hence to give unsworn evidence. However, she is reminded of the importance of telling the truth.”

17. Accordingly, on the basis of evidence before the Court the appellant was guilty of the alternative count of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.

Orders

18. The Court, therefore, quashes the conviction of the appellant for the offence of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act and sets aside the sentence of the imprisonment for 20 years imposed on appellant by the trial Court.

19. The appellant is convicted of the alternative charge of indecent act contrary to section 11 (1) of the Sexual Offences Act.

20. The appellant is sentenced to serve imprisonment for 10 years beginning the **4/12/2017**, the date of conviction and sentence in the trial Court.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.