**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 95 OF 2018**

**VINCENT KIPKOGEI BIWOTT.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the conviction and sentence of the Resident Magistrate's Court at Eldoret (Hon. E. Kigen, RM) dated 26 January 2018 in Eldoret Chief Magistrate's Criminal Case No. 5135 of 2012)***

**JUDGMENT**

**[1]** This appeal arises from the Judgment of **Hon. Kigen, RM**, delivered on **26 January 2018** in **Eldoret Chief Magistrate's Criminal Case No. 5135 of 2012: Republic vs. Vincent Kipkogei Biwott**. The Appellant had been charged before the lower court with the offence of defilement contrary to **Section 8(1)** as read with **Section (8)(3)** of the **Sexual Offences Act No. 3 of 2006.** It was alleged that on the **28th day of November 2012** in Uasin Gishu District within the Rift Valley Province, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **AJ,** a girl aged 10 months.

**[2]** The Appellant was also charged with an Alternative Count of indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars thereof were that on the **28th day of November 2012** in Uasin Gishu District within the Rift Valley Province, the Appellant indecently caused his genital organ (penis) to come into contact with the genital organ (vagina) of **AJ**, a girl aged 10 months.

**[3]** The Appellant denied the charges and, at his trial, the Prosecution called 3 witnesses in proof of its allegations. The Appellant was also given an opportunity to adduce evidence in his own behalf. In a Judgment rendered on **26 January 2018**, the Learned Trial Magistrate found the Appellant guilty and convicted him in respect of the Main Charge of defilement. The Appellant was, consequently, sentenced to life imprisonment. Being aggrieved by his conviction and sentence, the Appellant lodged this appeal on **26 October 2018** with the leave of the Court. His initial Grounds of Appeal were that:

> **[a]** The Learned Trial Magistrate erred in law and fact by convicting him and yet failing to consider that he was a juvenile at the time;
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> **[b]** That the Learned Trial Magistrate failed to appreciate that the investigation of the case was shambolic;
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> **[c]** That the Learned Trial Magistrate erred in law and fact by convicting him on the basis of medical inference which was not conclusive;
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> **[d]** That the trial court erred in law and fact by convicting him and yet failed to ensure that he was accorded a fair and impartial trial as stipulated in **Articles 27 and 159** of the **Constitution** and **Article 20** of the **Universal Declaration of Human Rights (1948)** by providing him with witness statements;
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> **[e]** That the Trial Magistrate failed to recognize that the case was not proved beyond reasonable doubt;
>
> **[f]** That the Trial Magistrate convicted him without considering his *alibi* defence as provided for in **Section 212** of the **Criminal Procedure Code.**

**[4]** Consequently, 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, contending that, as he was a minor at the material time, he ought to have been accorded the

protection provided for minors in the **Children Act, 2001**; that the medical evidence relied upon by the Trial Magistrate was not conclusive in proving defilement; that his trial was unfairly conducted and hearsay admitted by the trial court in disregard of the applicable law. The Appellant also complained that he was not given an opportunity by the trial court to address it at the close of the Prosecution Case; and that his *alibi* defence was totally disregarded by the trial court. To buttress his submissions, the Appellant relied on several authorities, namely:

**[a] Onyango vs. Republic [1969] EA 362**

**[b] Mutonyi vs. Republic [1982] KLR 203**

**[c] Wainaina vs. Republic [1978] KLR 11**

**[d] Criminal Appeal No. 71 of 2000: Juma Kalio vs. Republic**

**[e] High Court Criminal Appeal No. 326 of 2004: Msando vs. Republic**

**[f] Apela vs. Republic [1981] EACA 945;** and

**[g] Samson Tela Akute vs. Republic [2006] eKLR**.

**[5]** 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 child had been left under the care of the Appellant by her mother, who is the Appellant's sister; and when she returned she found the Appellant washing the baby, who was crying and bleeding. It was therefore the Respondent's submission that in the circumstances, the defence of *alibi* could not arise. Counsel therefore urged the Court to dismiss the appeal.

**[6]** 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).** And, therefore, it is imperative for the Court to re-evaluate the evidence presented before the lower court.

**[7]** The prosecution called three witnesses, namely: the mother of the minor **(PW1),** the investigating officer **(PW2)** and the doctor **(PW3).** Testifying on behalf of her 10-month old baby who was the victim of the crime**, PW1** told the lower court that, on the **28 November 2012,** she left the baby in her house under the care of her brother, the Appellant, to go and look for vegetables; that on return, she found her crying and bleeding from her private parts; and that she was being washed by the Appellant. She further testified that when she asked the Appellant what had happened to the child, his response was that the baby had defecated on herself; and that the bleeding was due to an accidental cut by the basin. As the girl appeared to be in great pain, she took her to her aunt who examined her and concluded that the girl had been defiled. **PW1** then took the child to **Chembulet Health Centre** from where she was referred to **Moi Teaching and Referral Hospital**.

**[8] PW1** further told the lower court that the nurses at **Chembulet Health Centre** were so disturbed by the nature of the girl's injuries that they caused the matter to be reported to the area Chief; who in turn looked for and arrested the Appellant, while she **(PW1)** was admitted in hospital with the child; and that it was the Chief who reported the occurrence to **Moiben Police Station**. She was later issued with a P3 Form which was filled and returned to the Police Station.

**[9] P.C. Nickson Ahenga (PW2)** testified before the lower court on **24 June 2013** and stated that he was on duty at **Moiben Police Station** on **1 December 2012,** when he was tasked to investigate the allegations of defilement against the Appellant. It was his evidence that the Appellant was then in custody at the Police Station; and that he was informed that that the minor was admitted at **Moi Teaching and Referral Hospital**. Accordingly, he visited the minor in hospital and recorded a statement from her mother, **PW1.** He thereafter compiled his file and caused the Appellant to be charged and arraigned before the lower court. He confirmed that the Appellant had been arrested by the area Chief; and added that he took him to **Moiben Dispensary** where his age assessment was done.

**[10]** The last Prosecution witness was **Dr. Eunice Telei (PW3)** of **Moi Teaching and Referral Hospital**. She testified on behalf of **Dr. Kibet,** who had filled the P3 Form, but had since left the Hospital. It was thus the evidence of **PW3** that the subject minor was examined by **Dr. Kibet** on **3 December 2012** and her findings were that the victim, a 10-month old child, had sustained 2nd degree tear of the vagina and was bleeding from her private parts; and that her hymen had been severed. It was further the evidence of **PW3** that, from those findings, **Dr. Kibet** concluded that the minor had been defiled and that her injuries were severe. She produced the P3 Form as the **Prosecution's Exhibit No. 1** before the lower court.

**[11]** On his part the Appellant told the lower court that, on the **29 November 2012**, he left in the morning to go and dig his shamba; and that when he returned to his sister's house for lunch (i.e. **PW1's** house) at 1.00 p.m. he got to learn from **PW1** that she had no money for food; and so he gave her **Kshs. 20/-** to go and buy some vegetables. He conceded that **PW1** left him with the subject minor to take care of while she was gone; and that since the minor was asleep at the time, he went back to the farm and returned home at 3.00 p.m. It was further the contention of the Appellant that he was therefore surprised when at about 4.00 p.m. it was alleged by villagers that he had defiled his niece. In essence, he denied having committed the offence of defilement as alleged or at all.

**[12]** The relevant provision of the law for purposes of the Main Count, of which the Appellant was convicted is **Section 8** of **the Sexual Offences Act.** It 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.**

**(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

**(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

**[13]** Accordingly, it was incumbent on the Prosecution to prove the following ingredients of the offence set out in the Main Count beyond reasonable doubt:

**[a]** the age of the minor

**[b]** Penetration of the minor's genital organ;

**[c]** Whether the penetration was committed by the Appellant.

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

**[14]** In **<u>Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010</u>** the Court of Appeal underscored the point that:

***"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".***

**[15]** 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."**

**[16]** In proof of the age of the subject minor, evidence was presented before the lower court by **PW1** that she was then a 10 months old baby. She showed the Court a photocopy of the baby's Child Health Card to prove her assertion that the minor was born on **31 January 2012**. The Record of Appeal, at line 20 on page 19 shows that the document was marked for identification. It appears however, that the said document was never produced as an exhibit for there is no such document in the lower court file. Nevertheless, the doctor who saw and examined the minor did indicate that she was 10 months old at the time of examination on **3 December 2012.** That evidence offers sufficient corroboration to the evidence of **PW1** that the minor was 10 months old at the time of the incident; and I so find, granted that evidence was entirely uncontroverted.

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

**[17]** On whether penetration was proved to the requisite standard, the Learned Trial Magistrate believed the testimony of **PW1**; which was that she returned home on the **28 November 2012** and found the child crying and was bleeding from her genital organ; that she took her to **Chembulet Health Centre** for treatment, from where she was referred to **Moi Teaching and Referral Hospital.** She further confirmed that at the **Moi Teaching and Referral Hospital**, the child was examined and it was established that she had been defiled. The evidence of **PW1** was augmented by the evidence of **PW3** and the P3 Form produced before the lower court as **Exhibit No. 2**. The P3 Form confirms that the minor had sustained 2nd degree perineal tear of the vagina and that her hymen had been severed. In the opinion of the doctor the injury was intrusive in that it involved penetration of the child's vagina; and added that the injury was life-threatening. According to the P3 Form, the girl was still bleeding as at **3 December 2012** when the examination and filling of the P3 Form took place. Accordingly, the Prosecution proved penetration beyond reasonable doubt; and it is therefore a fallacy for the Appellant to submit that the medical evidence was inconclusive.

**[c] <u>On Whether the offensive act of penetration was committed by the Appellant</u>:**

**[18]** On whether the defilement was perpetrated by the Appellant, there was no eye-witness. What the lower court was told was that **PW1**, who is the Appellant's sister, left the minor under the Appellant's care at about 1.00 p.m. on **28 November 2012**, as she went to buy vegetables for lunch. That upon return, she found the Appellant bathing the baby who was crying uncontrollably. She asked him what the matter was and the Appellant told her that the baby had defecated on herself, hence the need for a bath. **PW1** however noted that the water was bloody and got concerned. Hence, what was presented was circumstantial evidence, from which the lower court imputed guilt on the part of the Appellant. In the premises, the question that I pose is whether that evidence was strong enough to rule out the possibility that the offence could have been perpetrated by somebody else other than the Appellant.

**[19]** In **<u>R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135</u>,** the Court of Appeal for Eastern Africa held thus in respect of circumstantial evidence:

***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and***

***always remains with the prosecution. It is a burden which never shifts to the party accused."***

**[20]** It is significant that the Appellant conceded that the minor had been left by **PW1** under his charge. According to **PW1**, she found him bathing the distraught baby. **PW1** told the lower court that they had never differed with the Appellant; and added that he had always taken good care of the child before. No allegation of ill-will was made by the Appellant against his sister, such as would motivate her to give a false testimony against him; and therefore the trial court was, in the circumstances, entitled to believe **PW1** and to surmise that he was bathing the baby out of guilt and with the intention of destroying evidence.

**[21]** As the girl's uncle, he ought to have been as concerned as **PW1** and work towards ensuring that if someone else had defiled the child, who admittedly had been left under his charge, he would be the first to report the same to **PW1** for appropriate action to be taken. It is noteworthy that instead, and in addition to destroying evidence by bathing the baby, he lied to **PW1** that the child had been cut by the basin. Clearly therefore, the circumstantial evidence presented before the lower court was strong enough to *rule out any other reasonable hypothesis. I am satisfied that it pointed irresistibly to the guilt of the Appellant.*

**[22]** The Appellant did submit that he raised an *alibi* which the trial court failed to evaluate alongside the Prosecution case. However, the record of the lower court does show that the Appellant's defence, including his *alibi* that he had gone back to the shamba and left the baby sleeping, was given due attention but found to be unbelievable; and this is evident at pages 44 and 45 of the Record of Appeal. Thus, the trial court rightly found that the Prosecution evidence was not only strong enough to establish the Appellant's guilt beyond reasonable doubt but had also disproved his *alibi* defence. I would have no reason to reach a different conclusion.

**[23]** The Appellant also raised the issue of his youth and urged the Court to find that his rights were infringed in so far as he was not accorded the treatment due to minors as provided for under the **Children Act.** As a corollary to this, the Appellant submitted that the lower court failed to ensure that he was accorded a fair and impartial trial as stipulated in **Articles 27 and 159** of the **Constitution** as well as the **Universal Declaration on Human Rights (1948)** by providing him with witness statements.

**[24]** A perusal of the record of the lower court, however, paints a different picture. It shows that the Appellant was represented by an Advocate right from the inception of the criminal trial; that the said Advocate, **Mr. Sang**, applied for and was supplied with copies of witness statements as well as the documents that the Prosecution intended to rely on. The Advocate also brought to the attention of the trial court the fact that the Appellant was a minor at the time of his arrest; on which basis the trial court made an order that an age assessment be undertaken to ascertain the Appellant's age. The record further shows that the age assessment report showed that the Appellant was 17 years old. This is all evident at page 12 of the Record of Appeal; and that the lower court proceeded with the trial with this fact clear in mind.

**[25]** The record further shows, through the remand warrants and production orders, that the Appellant was held, not at the **Eldoret GK Prison,** but at the **Juvenile Remand Home**; and that ultimately, the lower court had him released on free bond, basically on account of his youth. Under those circumstances, it cannot be said that his rights under **Art. 53** of the Constitution or **Section 186** of the **Children Act** were infringed.

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

**[26]** The Main Charge, which is the Charge in respect of which the Appellant was convicted, was laid under **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. However, the evidence as to the age of the minor clearly pointed to the offence created by **Section 8(2)** of the **Sexual Offences Act**. It is disconcerting that, although this was manifest right from the date of the Appellant's arraignment before the lower court, no action was taken by the Prosecution, or the court as the custodian of justice, to have the anomaly corrected. Instead, in her Judgment, the Learned Trial Magistrate presumed, without any specific comments in that regard, that the Appellant had been charged under **Section 8(2)** and proceeded accordingly without paying any attention to the anomaly. In the **Judiciary Criminal Procedure Bench Book, 2018**, it is suggested that:

> **"If the age of a victim differs from the age requirements of the charged offence, the court can substitute the charged offence for an offence that reflects the proven age of the victim, and then convict for that offence. The substitution can only be for a lesser and cognate offence..."**

**[27]** In the instant case, there was no such substitution. Accordingly, it is my considered finding that, short of an amendment of charge, it was erroneous for the Learned Trial Magistrate to record a conviction under **Section 8(2)** when the Appellant was not charged under that provision of the law. Secondly, it was all along manifest, and there was no controversy in this regard, that the Appellant is an uncle to the minor. Consequently, the proper charge to be preferred in his case ought to have been the charge of incest pursuant to **Section 20(1)** of the **Sexual Offences Act.** Again, this discrepancy was neither corrected by the Prosecution before closing its case, nor addressed by the lower court in its Judgment. Right after the testimony of **PW1**, the lower court ought to have put the Prosecution to election as to whether or not they wished to proceed under **Section 20** of the **Sexual Offences Act**, it having been made manifest that the accused person was the uncle to the victim. Nevertheless, no prejudice was suffered and consequently, I find no basis for differing with the conclusion reached by the Learned Trial Magistrate that the offence of defilement of the minor was proved in all its elements; and that in the circumstances, the Appellant would be entitled to the less severe of the two penalties, which is the penalty prescribed by **Section 8(3)** of the **Sexual Offences Act**. Clearly therefore, the life sentence imposed on him is untenable.

**[28]** There is another reason why the sentence of life imprisonment is untenable; and it is the indubitable fact that, whereas he was an adult when the sentence of life imprisonment was meted, the Appellant was a minor as at **28 November 2012** when the offence is alleged to have taken place. The guideline furnished at Paragraph 119 of the **Criminal Procedure Bench Book** is that:

> **"When sentencing people who committed offences while they were minors, courts must consider that fact. Since the offence was committed while the offender was a minor, the penal sanction is a response to conduct of the offender when a child. The penal sanction imposed must therefore not be the same as what would have been imposed had the offence been committed by an adult. While some of the sentences in section 191 of the Children Act cannot be imposed upon an adult, the court's**

**decision should be consistent with the spirit of sections 190 and 191 of the Children Act. These sanctions focus on rehabilitation and embrace aspects of restorative justice, such as compensation and counselling. "**

**[29]** Thus, n **JKK v Republic [2013] eKLR,** the Court of Appeal held that:

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

**[30]** The death sentence was accordingly set aside and substituted with imprisonment for a period of 12 years. Similarly, in **DKC vs. Republic [2014] eKLR** in which the Appellant was sentenced to life imprisonment for the offence of murder, the Court of Appeal held that:

> **"...the appellant could not be sentenced to life imprisonment ... because the Appellant was aged 15 years in February 2009...The best interest of the appellant as a minor offender ought to have been of paramount consideration when passing the sentence. The life of a minor would be preserved, he must also be rehabilitated which in our view includes being brought to bear the consequences of his omission, errors of judgment and disregard of the rule of law. Due to his omissions, an innocent life of a Kenyan was lost. Although the appellant was a minor, he must be brought to bear the consequences of his omission and lack of proper judgment...life imprisonment is not provided for under the Children Act, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner..."**

**[31]** It is therefore in the light of the foregoing that I would set aside the sentence of life imprisonment imposed on the Appellant by the lower court and substitute it with imprisonment for 20 years pursuant to **Section 191(1)(l)** of the **Children Act.** I would accordingly confirm the Appellant's conviction and partially allow his appeal on sentence as aforementioned.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF JUNE 2019**

**OLGA SEWE**

**JUDGE**