**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CRIMINAL APPEAL NO. 21 OF 2019**

**PMF.....APPELLANT**

**=VRS=**

**THE STATE.....RESPONDENT**

**{Being an appeal against the Judgement of Hon. M. O. Wambani - CM Nyamira**

**dated and delivered on the 15th day of May 2019 in the original Nyamira**

**Chief Magistrate's Court Criminal Case No. 1152 of 2014}**

**JUDGMENT**

The appellant was charged with **Incest contrary to Section 20 (1) of the Sexual Offences Act** the particulars of which were that on7th November 2014, in Manga District within Nyamira County, being a male person caused his penis to penetrate the vagina of EK a female person who to his knowledge was his daughter.

In the alternative it was alleged that he committed an indecent act with EK, a child aged 10 years, by intentionally and wilfully touching her vagina with his penis contrary to Section11(1) of the Sexual Offences Act.

The appellant also faced a charge of assault contrary to Section 251 of the Penal Code the particulars being that on 7th November 2014 in Manga district within Nyamira County he unlawfully assaulted EK thereby occasioning her actual bodily harm.

The appellant pleaded not guilty to all the charges and a trial in which the prosecution called seven witnesses ensued. On his part, the appellant made an unsworn statement in which he maintained his innocence and contended that the complainant had been coached by her mother. However after evaluating the evidence the trial magistrate came to the conclusion that the charge of incest and that of assault causing actual bodily harm had been proved beyond reasonable doubt. The trial Magistrate convicted the appellant and thereafter sentenced him to imprisonment for twenty (20) years for incest and to three (3) years imprisonment for assault and directed that the sentences were to run concurrently.

This appeal is against the conviction and the sentences. The same is premised on following three grounds: -

> **"1. THAT the trial court erred in law and in fact in convicting the appellant based on contradicting evidence tendered by the prosecution witnesses especially the evidence of Pw1, Pw2 Pw3.**
>
> **2. THAT the trial court erred in law and in fact in convicting the appellant based on a medical evidence that was filled seven days after the date of the alleged offence and which document did not disclose the offence of sexual assault.**
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> **3. THAT the trial court erred in law and in fact by convicting the appellant without compiling (sic) with section 200 (3) of the criminal procedure code fully."**

When Counsel came before me for directions they consented to argue the appeal through written submissions but by the time of writing this judgment only those of the appellant had been received.

In summary, Counsel for the appellant submitted that the evidence adduced by the prosecution fell short of the standard required to prove the charges against the appellant. Counsel contended that the evidence was not only riddled with inconsistencies and contradictions but was

possibly motivated by a grudge. Counsel also submitted that most of the evidence was hearsay and that the evidence of the complainant ought to be disregarded as the trial magistrate did not conduct a *voire dire* before reception of the same yet the complainant was a child of tender years. Counsel cited several cases to support his submissions.

As the first appellate court I have analysed and evaluated the evidence in the court below so as to arrive at my own independent conclusion while keeping in mind that unlike the trial court, I did not see or hear the witnesses giving evidence.

A certificate of birth tendered in evidence confirmed that the complainant was born on 3rd April 2004 which means she was barely seven months into her 10th year when these crimes were committed against her. She gave evidence that on the material day her mother had gone for a funeral; that she got home from school at about 6pm and was tending to their cattle when her father, the appellant arrived and instructed her to go for his shoes. He however followed her to the house and took her to his bedroom. She stated that he undressed her, applied petroleum jelly to his genital organ and lying on her inserted it into her genital organ. She stated that while he was in the act her aunt went to the house and when he heard her knocking he jumped out of the house and escaped through the window. She also told the court that as a result of what the appellant did to her she sustained an injury on the back. When her mother returned from the funeral she reported the incident to her but she did not take any action. It was the appellant who ended up taking her to hospital much later and even then he made sure she was not left alone with the doctor so as not to disclose what he had done to her. She was treated at various hospitals including Kenyatta National Hospital. It was her evidence that the appellant had threatened to cut her into pieces if she told anyone. The matter was reported to the police by her brother after a month and the accused was then arrested and charged. The complainant's mother and aunt gave evidence. Her aunt (Pw2) confirmed that she found her in the appellant's bedroom crying and without her undergarment and when she inquired why she was crying she told her she had been defiled by the appellant and gave her the details of how he had done it. The complainant's mother (Pw3) told the court that by the time she returned home after the funeral the complainant had been taken to hospital by the appellant. She stated that she went to the hospital and a doctor disclosed to her that the complainant had been defiled.

In his defence, the appellant conceded that the complainant was his daughter. He however denied defiling her and stated that she had been coached by her mother.

The complainant's evidence was recorded on 12th August 2015 when she was 11years old. It is clear from the record that the then trial magistrate received that evidence without conducting a ***voire dire*** as required under **Section 19 (1) of the Oaths and Statutory Declarations Act** which states-

> **"(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."**

In the case of **Samuel Warui Karimi v Republic [2016] eKLR** the Court of Appeal stated: -

> ***"Who is a child of tender years is an issue we think requires clarification because the courts have made various conclusions. Section 2 of the Children's Act defines a child of tender years to mean 'a child under the age of 10 years'. We have not come to any other statutory definition of a child of tender years other than the above which in our view was perhaps informed by the broad interests of protecting children from criminal responsibility and not as a test of competency to give evidence in Criminal proceedings. Court decisions regarding the competency of evidence of children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to voire dire examination."***
>
> ***Which definition should guide the Courts in determining who is a child of tender years, is it the Children Act, or the precedents set by the Court of Appeal? The requirement by the aforementioned provisions of the Evidence Act and the Oaths and Statutory Declarations Act of voire dire examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the Constitution. we have done the aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct voire dire examination on the Complainant aged 12 years affected the credibility of her evidence. We are persuaded the definition of a child of tender years under the Children Act cannot globally be imported for offences under the Criminal Law. ……***
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> ***……this explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials……..."***

The court then made a finding that:

> ***"Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received, thus the conviction of the Appellant becomes unsafe to sustain as she was the complainant and not any other witness."***

As stated by the Court of Appeal in the above decision, a voire dire is meant to guarantee an accused person the right to a fair trial. In the case of **Maripett Loonkomok v Republic [2016] eKLR,** the same court however while agreeing that such evidence cannot be used to sustain a conviction came to the conclusion that it is not in all cases that such an omission vitiates a trial. The court reiterated that if there is sufficient independent evidence to support the charge the court may still be able to sustain the conviction. Being guided by this decision of the Court of Appeal, which is also the route preferred by counsel for the appellant, it is my finding that the omission to conduct a voire dire

in this case ought not to vitiate the entire prosecution. It is my finding that in this case there is independent evidence in the testimony of CKO (Pw2) to support the charge. This witness confirmed that she in fact went to the appellant's house at the material time upon hearing the complainant's cries and found her in the appellant's bedroom crying. The witness confirmed that the complainant told her what the appellant had done and saw she had a discharge in her genitalia when she looked at her. This witness also confirmed that the complainant did not have underpants at the time she found her. The Clinical Officer (Pw6) who filled the P3 form decried the length of time taken to present the complainant for examination. He did however confirm that the complainant had developed a lower back pain and was not able to walk or stand on her own. He confirmed that there was tenderness on her lower back and also the fact that the complainant had been seen in various hospitals. It is my finding that even though too much time had elapsed and evidence of penetration lost, the evidence of the clinical officer corroborated that of the complainant. I am satisfied therefore that whereas this court cannot rely on the evidence of the complainant as the voire dire was not conducted, there is independent evidence to support the charge. The evidence of the two witnesses was not hearsay as it is based on what they saw. The witnesses whose evidence I have cited were also very consistent and there is nothing in the evidence to suggest their evidence was actuated by malice. I find no merit in the appeal against the conviction and as the sentences imposed were lawful, the appeal is dismissed in its entirety.

**Signed, dated and delivered in Nyamira this 7th day of November 2019.**

**E. N. MAINA**

**JUDGE**