**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 194 OF 2016**

**AYUB MUGO TABITHA........APPELLANT**

**VERSUS**

**REPUBLIC............................RESPONDENT**

*(Being an appeal from the Judgment of Honourable R. Amwayi Resident Magistrate, delivered on 24th November, 2016 in Molo Chief Magistrate's Court Criminal Case No. 1874 of 2016)*

**JUDGMENT**

1. Ayub Mugo Tabitha, the Appellant herein, was arraigned before the Molo Chief Magistrate's Court charged with a single count of defilement contrary to section 8(1) as read together with section 8(4) of the Sexual Offences Act. It was alleged that between 19/06/2016 and 24/06/2016 within Kericho County, he intentionally caused his penis to penetrate the vagina of RW, a child aged 16 years old.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The allegations were that at the same place and time, the Appellant committed an indecent act with RW by intentionally touching her vagina with his penis.

3. The Appellant denied the charges. The case proceeded to full trial. The Prosecution called four witnesses. The Learned Trial Magistrate found that the Appellant had a case to answer and placed him on his defence. The Appellant gave an unsworn statement and did not call any witnesses. At the conclusion of the case, the Learned Trial Magistrate found that the Prosecution had proved its case beyond reasonable doubt and convicted the Appellant. She sentenced him to fifteen years imprisonment.

4. The Appellant is aggrieved by the conviction and sentence and has appealed to this Court. He has proffered four grounds of appeal as follows:

> *1. That the learned trial magistrate erred in law and facts by convicting the Appellant on a defective charge sheet.*
>
> *2. That the learned trial magistrate erred in law and facts by convicting the appellant yet voire dire examination was not conducted*
>
> *3. That the learned trial magistrate erred in law by convicting the Appellant on the evidence of the Complainant and yet failed to understand that the Complainant was desperate and was after marriage.*
>
> 4. *The learned trial magistrate erred in law and facts by convicting the Appellant on a P3 Form which was not certified hence inauthenticity*.

5. The Appellant filed Written Submissions and during the hearing indicated that he did not wish to add anything. Mr. Motende, the Prosecution Counsel, opposed the appeal and urged the Court to affirm the conviction and sentence as there was ample evidence to justify them.

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** **(1957) EA 336**, ***Ruwala vs. R*** **(1957) EA 570**.

7. The evidence adduced at the trial was quite straightforward. RW testified that she left Gilgil on 19/06/2016 in the company of the

Appellant. They boarded a vehicle and went to his home in Londiani. She testified that she lived with him, sleeping in his house there between 19/06/2016 until 26/06/2016 when the Appellant was arrested by the area Chief and two Administration Police Officers from the house. RW testified that in the homestead there were two houses: one belonging to the Appellant; the other to the Appellant's mother.

8. RW was categorical that every night while he was at the Appellant's house they had sex. She would sleep without her panties and Ayub would remove his trousers and underwear and penetrate her vagina with his penis. This continued until the morning the Area Chief came knocking on the door at 4:00am in the morning and arrested the Appellant. RW was then taken for medical examination.

9. The Area Chief who arrested the Appellant is Simon Mwangi Muli of Masaita Location. He testified that he received information from informers that a child had been brought to his location and was being defiled by the Appellant in his house. He, therefore, arranged to go to the Appellant's early in the morning of 26/06/2016 to confirm or disprove the allegations. He went there at 4:00am on that day accompanied by two Administration Police Officers. He testified that the homestead had two houses – one for the Appellant and the other one for his mother. They knocked on the Appellant's house. It was locked from inside but he opened. They went in. They found RW sleeping on the bed. They arrested the Appellant on suspicion of defilement. They took him to Londiani Police Station. The girl accompanied them as well.

10. At the Police Station, the Appellant was handed over to PC Josephine Chepkoech who became the Investigating Officer in the case. She testified as PW4. She took both the Appellant and RW to Londiani Sub-county hospital for examination and issued them with P3 Forms to be filled. She later took RW for age assessment on 02/11/2016. She produced the age assessment report as an exhibit in the case. She completed her investigations and formed the opinion that the Appellant had committed defilement and charged him in Court.

11. At the hospital, it was Mr. Alfred Cherere, a Clinical Officer, who examined both the Appellant and RW. He testified as PW2. On examination, Mr. Cherere noticed blood on RW's panties. He found that RW had no hymen but he found blood oozing through cervix and vaginal areas. Mr. Cherere testified that RW claimed that the blood was due to her monthly periods. RW had no other injuries. All other tests were negative. Mr. Cherere concluded that RW had been defiled. He produced the P3 Form he filled out with respect to RW. He also produced as an exhibit the P3 Form he filled out with respect to the Appellant after conducting tests on him. He found nothing remarkable in the tests.

12. The Learned Trial Magistrate had no doubt that the offence had been proved beyond reasonable doubt. She reasoned:

*The Accused and Complainant used to sleep in the same house and same bed and therefore exposing the Accused to an opportunity to commit the offence and he committed it. He defiled the Complainant herein in his own house. There is no reason why the Complainant would have lied against the Accused herein. She was consistent in her testimony and I also had a chance to observe her demeanor. Her evidence was coherent and consistent and I therefore believed her. The Defence by Accused is a mere denial of the incident and does not in any way shake the evidence of the Prosecution. I find that the Accused Person was at the scene on [the] material date and time and had the opportunity to commit the offence which he actually committed*.

13. To successfully obtain a guilty verdict, the Prosecution was required to prove three ingredients of the offence of defilement:

a. That the victim (RW) was between sixteen and eighteen years old;

b. That there was penetration; and

c. That it was the Appellant who caused the penetration.

14. The age of the victim was not a seriously contested issue at all. RW testified that she was sixteen years old and an age assessment report produced in Court was categorical that she was, indeed, sixteen years old.

15. On penetration, there was the clear and straightforward evidence of RW that the Appellant had sexual intercourse with her every night when she was at his place. The Appellant did not even bother to cross-examine her on this testimony. This testimony is reinforced by that of Mr. Cherere, the examining Clinical Officer, who found a missing hymen as well as traces of blood in RW's genitalia. Further, the evidence is reinforced by the circumstantial evidence given by Mr. Muli, the Area Chief, who testified that he found RW in the Appellant's bed on the day of arrest. These pieces of evidence mutually lead to an ineluctable conclusion that there was penetration.

16. On the identity of the person who caused penetration, again the evidence of RW which was unchallenged and undisputed coupled with that of Mr. Muli are conclusive that it was the Appellant who caused the penetration.

17. The Appellant complains on appeal that the charge sheet was defective. He says it was defective because it does not contain the word "unlawful". Unfortunately for him, this line of technical reasoning is no longer tenable to defeat otherwise valid convictions.

18. The Court of Appeal had occasion to deal with this question in ***JMA vs Republic [2009] KLR 671***. The High Court had quashed a conviction on the main charge of defilement and found the appellant guilty on the alternative charge because the charge sheet did not contain the words "intentionally and unlawfully" making the main charge fatally defective. On that question, the Court of Appeal held that:

> *This was a case in which the superior court should have invoked the provisions of Section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor.*

19. The same applies here. In any event, looking at the wording of the various sub-sections in section 8 of the Sexual Offences Act, I am not persuaded that the words "unlawfully and intentionally" are necessary. The sections are quite clear that any penetration or attempt at penetration on a child, without more is a violation of the act; it is *per se*, unlawful.

20. The Appellant raises a second technical objection: it is that RW was not subjected to voir dire before she was allowed to testify. It is true that under section 19 of the Oaths and Statutory Declarations Act, where a child of tender years is called as a witness, the Court must first conduct a *voir dire* examination before allowing the child to give evidence.

21. However, the courts have consistently held that a child of tender years for purposes of the Oaths and Statutory Declarations Act is one the age of under fourteen years ***(See Kibageny Arap Kolil** v **R (1959) EA 82; Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014***). In the present case, RW was sixteen years old. There was no requirement, absent special circumstances, to subject her to *voir dire* before allowing her to take oath.

22. Lastly, the Appellant protests that the conduct and evidence of RW was not one of someone who had been defiled but someone who was desperate to get married. He is persuaded that this should have vitiated the charges against him. Perhaps the Appellant here is alluding to the defence afforded a person charged with the offence of defilement under section 8(5) and 8(6) of the Sexual Offences Act. The two sub-sections read as follows:

> *(5) It is a defence to a charge under this section if—*
>
> *(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and*
>
> *(b) the accused reasonably believed that the child was over the age of eighteen years.*
>
> *(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant*.

23. However, in the present case, the Appellant provided no evidence at all during trial that RW deceived him that she was over eighteen years old. Neither did he offer any evidence that he reasonably believed her to be over eighteen years old.

24. The upshot is that the appeal herein has no merit and it is hereby dismissed. Since the Appellant received the minimum sentence allowable under the Statute, his appeal against sentence equally falls by the wayside. Both the conviction and sentence are hereby affirmed.

25. Orders accordingly.

**Delivered at Nakuru this 20th day of September, 2018**

**………………**

**JOEL NGUGI**

**JUDGE**