REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 29 OF 2017

GEOFFREY KORIR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from Original Conviction and Sentence in **Molo Chief Magistrate's***

Criminal Case No. 633 of 2016** by **Hon. Rita Amwayi R M** on **13/03/17).

J U D G M E N T

1. **Geoffrey Korir,** the Appellant was charged, taken through full trial and convicted of the offence of **Defilement** contrary to **Section 8(1) (4)** of the **Sexual Offences Act.** He was sentenced to **fifteen (15) years imprisonment.**

2. Facts of the case were that the Appellant was known to the Complainant as a cobbler. On the **1st** day of **March, 2016** the complainant passed by his place of work with the intention of collecting a book that her friend had left with him. The Appellant excused himself to go collect it from the house. He took too long therefore the Complainant followed him. While in the house they engaged in consensual sexual intercourse. After the act the door was knocked by some people who included the Chief. They were arrested and taken to the police station. Their parents were notified. They were taken to hospital for examination. Subsequently investigation were concluded which culminated into the Appellant being charged.

3. When put on his defence the Appellant stated that on **27th January, 2016** the brother to one of his workers went to his shop and purchased a new pair of shoes. That on the **1st March, 2014** the Complainant went to collect a book that she had left at the shop. He told her to go and check for it at the house. Since she was to purchase some items from the market he decided to go and look for the book himself. When he reached the house he encountered some men outside waiting for him. They offered to pay some deposit for peas for the following day. He offered them a cup of tea and decided to shower. When he returned to the house the Complainant and another girl were there. As he looked for the book he was arrested by **"Nyumba Kumi"** Agents. The village elder and Chief took him to the Administration Police Post. While there a village elder arrived and claimed that their daughter had been defiled. Her mother denied but the Complainant recorded a statement and he was charged.

4. The learned trial Magistrate considered evidence adduced and reached finding that the Complainant was a minor and there was penetration in her genitalia by the Appellant.

5. Aggrieved by the conviction and sentence, the Appellant appealed on grounds that the case was not proved beyond reasonable doubt; *voire dire* examination was not conducted and the conduct of the Complainant was not taken into consideration.

6. The Appellant canvassed the Appeal by way of written submissions. He urged that as stated by the Complainant she went to his house to look for the book but nothing happened between them. That she stated otherwise after being threatened by the Prosecution. That the allegation that she had penetrative sexual intercourse with him (Appellant) was an afterthought as it was clearly stated by the Doctor who examined her that she had menses. He questioned why the three (3) men who did not testify closed the door as soon as the Complainant entered the house.

7. He urged that it is mandatory for children under the age of **eighteen (18) years** to be subjected to *voire dire* examination. In this regard he cited the case of **Peter Kiume vs. Republic (11) Lord Justice Bridge** put it in a more subtle manner *in* ***R vs Lal Khan (12)*** where the Court stated thus:

"The important consideration…..when a judge has to decide whether a child should properly be sworn, is whether the child has

sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"

There were therefore two aspects when considering whether a child should be sworn:- first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"

And **Gabriel Maholi vs. Republic (13) EA CA** where the Court of Appeal stated that:

"Even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood."

8. He concluded by arguing that the offence of **defilement** should not be limited to age and penetration. That the conduct of the Complainant plays a fundamental role. That the circumstances of the case did not depict a picture of a person who was defiled. And that the Appellant is amenable to **Section 8(5)** of the **Sexual Offences Act** which is a defence as he was deceived as to the age of the Complainant.

9. The State through learned Senior Assistant Director of Prosecution, **Mr. Kemo** opposed the Appeal. He urged that all elements of the offence of **defilement** were proved and the sentence that was meted out was lawful. That although the Complainant had menses, a high vaginal swab carried out revealed the presence of spermatozoa which was proof of penetration.

10. In a rejoinder the Appellant urged that no spermatozoa was noted and there was no proof that he (Appellant) was the one who tore the hymen of the Complainant and the people who rang the Chief should have been called to testify.

11. This being the first Appeal, I am duty bound to re-evaluate and reconsider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusions with that in mind ***(See Okeno – vs- Republic [973] E.A. 32).***

12. To prove the case the Prosecution was required to prove:

i. The age of the Complainant.

ii. The act of penetration.

iii. The perpetrator of the act.

13. The Prosecution adduced in evidence a Birth Certificate **Serial No. ****** issued to the Complainant. According to documentary evidence she was born on the **4th August, 1998.** At the time of the incident she was **17½ years old. Section 2** of the **Children Act** defines a child as a human being under the age of **eighteen years.** Therefore the Complainant was a child.

14. PW1, the Complainant aroused people's suspicion because she went into the Appellant's house wearing school uniform. PW3 **Raphael Kipngetich Toweett** on being notified went to the house of the Appellant, found both of them inside and caused them to be arrested. She was taken to hospital and examined by PW4 **Komen Minigwa,** a Clinical Officer who found her hymen missing. She was bleeding because she was having menses but a vaginal swab done revealed the presence of spermatozoa.

15. The presence of spermatozoa was evidence of having engaged in penetrative sexual intercourse therefore the Complainant's version of the testimony of having had consensual sex with the Appellant must be believed.

16. In his submissions the Appellant vehemently denied having penetrated the Complainant. He urged the Court to accept the introductory part of the Complainant's testimony where she stated that when she entered the house some three individuals locked the door and sent someone to call the Chief, yet they had not done anything. However, as he concluded his argument he seemed to be taking refuge in **Section 8(5)** of the **Sexual Offences Act** that provides thus:

"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."

In his defence at trial the Appellant gave a tale absolving him from any blame. He denied having defiled the Complainant. Therefore circumstances of the case as urged following the case he cited namely **Charo vs. Republic (2016) eKLR** is not favourable to his cause.

17. It is urged by the Appellant that the Court fell into error as it did not conduct *voire dire* examination prior to letting the Complainant testify. *Voire dire* process is usually done by a Judicial Officer/Judge to determine the suitability or competence of the witness to testify.

18. Voire dire examination is observed in cases of children of tender years. This is provided in **Section 19** of the **Oaths and Statutory**

Declarations Act (Cap 15) that stipulates thus:

> ***"(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.***
>
> ***(2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."***

In the case of **Kibageny Arap Korir vs. Republic (1959) EA 82** the Court of Appeal held that:

> ***""a child of tender years" meant a child under the age of 14 years."***
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> **Section 2** of the **Children Act** however defines a child of tender years to be a child under the age of **10 years.** Though the Court of Appeal in the case of **Samuel Warui Karimi vs. Republic Criminal Appeal No. 16 of 2014** stated that the test of competency to testify, the time honoured is **14 years** which therefore remains the correct threshold for *voire dire* examination.

19. And even when *voire dire* examination is not conducted in some cases it does not vitiate the Prosecution's case.

20. In this case the Complainant was not a child of tender years therefore *voire dire* examination was not necessary.

21. The Complainant's conduct has been questioned. It is evident that the Complainant had consensual sex with the Appellant but being a child, legally, she was incapable of consenting to the act.

22. The sentence imposed by the trial was the minimum prescribed sentence for the offence. Therefore I affirm both the conviction and sentence.

23. In the result, the Appeal lacks merit and is dismissed in its entirety.

24. It is so ordered.

Dated, Signed and **Delivered** at **Nakuru** this **13th** day of **December, 2018.**

L.N. MUTENDE

JUDGE