REPUBLIC OF KENYA

IN THE HICH COURT AT ELDORET

CRIMINAL APPEAL NO. 8 OF 2010

S K N ……...……. APPELLANT

VERSUS

REPUBLIC .....……..……. RESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable J.M NJOROGE Principal Magistrate, dated 23rd December, 2009, in Kapsabet Principal Magistrate's Court Criminal Case No.1170 of 2006)

JUDGEMENT

1. The appellant was tried and convicted of the offence of defilement contrary to *Section 145* of the *Penal Code.* He was sentenced to twenty years imprisonment.

2. The particulars of the charge alleged that on 27th May, 2006 in Nandi North District within the Rift Valley province, the appellant had carnal knowledge of *M.C* (*Name Withheld)* a girl under the age of sixteen years.

3. The appellant was aggrieved by his conviction and sentence. He filed, through his advocates, *Ms Kitur & Co. Advocates,* a petition of appeal dated 6th January, 2010.

4. In his petition of appeal, the appellant raised seven grounds which can be condensed into two main grounds namely;

> (a) That the learned trial magistrate erred in law in failing to establish that the charge as framed was defective as it did not disclose the offence of defilement under *Section 145 (1)* of the *Penal Code.*
>
> (b) That the learned trial magistrate erred in law and fact by convicting and sentencing him on evidence which did not prove the offence beyond any reasonable doubt.

5. The appeal was prosecuted by way of oral submissions. At the hearing on 2nd January, 2017, learned counsel *Mr. Kirui* appeared for the appellant while the Respondent was represented by learned prosecuting counsel *Ms Oduor*. In his submissions, *Mr. Kitur* urged the court to find that the appellant was wrongly convicted as the conviction was based on a defective charge sheet; that the particulars supporting the charge did not allege that the act of having carnal knowledge was unlawful. For this proposition, he relied on the authority of ***Daniel Nyareru Achoki V Republic (2000) eKLR*** where the Court of Appeal held that a charge of rape or attempted rape was fatally defective if its particulars did not state that the act of carnal knowledge was unlawful and without the consent of the complainant. Counsel further submitted that the learned trial magistrate erred in convicting the appellant on unsubstantiated

medical evidence that the appellant had infected the complainant with H.I.V AIDS and in relying on contradictory evidence adduced by the three key prosecution witnesses namely PW1, PW2 and PW3. He beseeched the court to find that the appellant was wrongly convicted and allow the appeal.

6. The state conceded to the appeal. *Ms Oduor* agreed with the appellant that he was wrongly convicted on grounds that there was a discrepancy regarding the age of the child and no evidence was adduced to prove her age; that the prosecution did not adduce any evidence to prove that it is the appellant who had infected the complainant with the HIV virus and that the charge founding the conviction was fatally defective.

7. This being a first appeal, this court is enjoined to re-evaluate the evidence on record and draw its own independent conclusions bearing in mind that it did not have the advantage of seeing or hearing the witnesses; See ***Okeno V Republic 1972 EA 32; Kiilu & Another V Republic (2005) KLR 175***.

8. I have carefully considered the grounds of appeal, the submissions by learned counsel and the evidence on record. I note that the trial was conducted and concluded in the year 2009 before the *Sexual Offences Act* came into force on 21st July, 2006. This appeal will therefore be determined on the basis of what constituted the offence of defilement as created by *Section 145* of the *Penal Code* which was the operative law before the promulgation of the *Sexual offences Act.*

9. In order to determine whether or not the appellant was convicted on a defective charge sheet as urged by both counsel on record, it is important to take a close look at *Section 145* of the *Penal Code* (now repealed). The Section was in the following terms;

1. "Any person who unlawfully and carnally knows any girl under the age of 14 years is guilty of a felony and is liable to imprisonment with hard labour for fourteen years together with Corporal punishment".

10. In my view, the omission of the word "unlawful" in the particulars supporting the charge did not by itself render the charge sheet fatally defective. My take is that the act of having carnal knowledge of a girl under the age of 14 years is what made the act unlawful and though it was desirable for the prosecution to specifically include the expression "unlawful" in the particulars of the charge, failure to include it did not make the charge incurably defective.

11. The Court of Appeal in the ***Daniel Nyareru Achoki case (Supra)*** was dealing with a charge of attempted rape contrary to *Section 141* of the *Penal Code* and the court held that for the offence of rape or attempted rape to be disclosed, the prosecution must state that the act of carnal knowledge or attempt thereof was unlawful and was without the consent of the woman or girl. It is noteworthy that the law envisaged complainants in the offences of rape or attempted rape to be either adult females or a girl above 14 years old who then had capacity to give consent to the act of intercourse. A girl of 14 years and below was not expected to give her consent to the act of intercourse and that is why carnal knowledge of a girl under the age of 14 years constituted the offence of defilement under *Section 145* of the *Penal Code*. It is therefore immaterial whether or not the particulars supporting the charge stated that the act of having carnal knowledge of such a girl was unlawful. It would be unlawful in any event. It is thus my finding that the omission to include the word "unlawful" in the particulars of the offence was an irregularity which was curable under *Section 382* of the *Criminal Procedure Code* and it is not one which can vitiate the conviction entered in this case. Nothing therefore turns on this ground of appeal.

12. Turning to the issue of whether the evidence adduced before the trial court was sufficient to prove the charges against the appellant beyond any reasonable doubt as required by the law, I find that the learned trial magistrate based her conviction of the appellant on the finding that he is the person who had sexually assaulted the complainant, a girl aged 5 years and infected her with HIV.

13. On my re-appraisal of the evidence, I find that there was no basis for that finding by the learned trial magistrate since no evidence was placed before her to establish the HIV status of the appellant. Besides, the medical evidence in the P3 form produced as Pexhibit 1 by PW4 only indicated that the complainant

had been infected with a sexually transmitted disease. It did not state that the sexually transmitted disease was HIV.

PW4 only produced the P3 form on behalf the doctor who had examined the complainant. He did not personally examine the minor and as the P3 form does not show that the complainant was infected with HIV, it is not clear what informed PW4's claim that the minor had been infected with the virus.

14. The P3 form also clearly indicated that no injuries were noted on PW1's genitalia. In the circumstances, penetration was not proved. Penetration is a critical ingredient of the offence of defilement and failure to prove it gives the prosecution's case a fatal blow.

15. In view of the foregoing, I have come to the conclusion that the charge of defilement was not proved against the appellant beyond any reasonable doubt. Had the learned trial magistrate thoroughly interrogated the evidence adduced before her in its entirety as she was enjoined to do, she may have reached a different conclusion. On my part, I am satisfied that the appellant was wrongly convicted and he is entitled to an acquittal. The learned prosecuting counsel was therefore right in conceding to the appeal.

16. In the end, the appeal is allowed. The appellant's conviction is hereby quashed and the sentence of twenty years imprisonment set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

C. W. GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **25th** day of **January, 2017.**

In the presence of:-

Mr. Aseso holding brief for Mr. Koros for the appellant

Ms. Oduor for the Republic

Mr. Lobolia court clerk