*REPUBLIC OF KENYA*

*IN THE HIGH COURT OF KENYA*

*AT MERU*

*CRIMINAL APPEAL NO. 24 'A' OF* **2011**

**MARTIN GITONGA KINYAMU.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant **MARTIN GITONGA KINYAMU** was charged with the offence of defilement contrary to Section 8 (1) of the Sexual Offences Act No. 3, of 2006. The particulars of the offence were that the appellant on 14th day of April 2009, at ***[particulars withheld]*** village, Ndunguri sub-location, Ganga location, Mwimbi Division in Maara District, within Eastern province, defiled **MK, A CHILD AGED 14 YEARS**. The appellant faced an alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. In that he committed an act of indecency with MK a child aged 14 years old, by touching her private parts and breasts.

The appellant was tried and convicted on the main charge of defilement and sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence, the Appellant who was then acting in person, preferred this appeal on 22 February 2011. Mr. Muriithi, Advocate, later came on record for the appellant and filed a supplementary petition of appeal setting out the following grounds of appeal:

1. **THAT the Learned Trial Magistrate erred in law in entertaining proceedings premised on a defective charge sheet;**

**2. THAT the Learned Trial Magistrate erred in law in conducting proceedings in a language that is unverifiable and which the appellant did not properly comprehend;**

3. **THAT the Learned Trial Magistrate erred in law and fact in admitting the evidence of PW1 without conducting a** *voire dire* **examination;**

4. **THAT the Learned Trial Magistrate erred in law and fact in convicting and sentencing the appellant in proceedings where the age of the complainant was not established;**

5. **THAT the Learned Trial Magistrate erred in law and fact in failing to maintain a coherent record of the proceedings;**

6. **THAT the Learned Trial Magistrate erred in law and fact in convicting and sentencing the appellant in proceedings that were conducted contrary to the provisions of the Children's Act No. 3 of 2001;**

7. **THAT the Learned Trial Magistrate erred in law in sentencing the appellant on the basis of an age assessment report whose source, content, maker and authenticity were unverifiable by the appellant thus rendering it inadmissible.**

This is the first appellate court and the entire evidence adduced before the trial court will be examined afresh, evaluated and anlaysed for this court to draw its own conclusions. I am alive to the fact that I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of ***Kiilu and Another V R (2005) 1 KLR 174*** where the court of Appeal held thus:

> ***"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weight conflicting evidence and draw its own conclusions…***
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> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.."***

When the appeal came up for hearing on 13th May 2015, Mr. Muriithi, Counsel for the appellant sought to rely on the supplementary petition of appeal dated 30th April 2015. He submitted that the charge was defective in that it did not disclose an offence under section 8 (3) of the Sexual Offences Act; that the proceedings were not clear as to the language that was used at the trial. He further submitted that a *voir dire* examination was not carried out in respect of PW1 who was said to be 14 years at the time that she testified; that the age of the complainant was not ascertained and lastly that section 186 of the Children's Act was not complied with.

Mr. Mulochi, Learned State Counsel conceded the appeal on the grounds that the appellant was 17 years at the time of the offence and that he should have been tried under the provisions of the Children's Act; that the appellant was convicted of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act, but the charge sheet omitted Sub-Section 3. Counsel urged that the appellant's trial was a miscarriage of justice.

Briefly, the prosecution's case was as follows; **PW1 MK** a child aged 14 years was on 14th April 2009, coming from the shop near her home where she had been sent when she met the appellant standing near a gate, and she greeted him as she was walking heading home. She then heard someone pulling her hand roughly and when she looked back, she saw it was the appellant and she begun screaming. The appellant then held her mouth and pulled her back towards the gate where he had been standing and led her into his house which was not very far from the gate. He then put her on the bed and took a *panga* and threatened to kill her if she screamed, removed her biker, and her clothes and proceeded to have sex with her by inserting his penis in her vagina. When he finished PW1 then dressed up and left for home and her parents asked her why she had taken long and she told one Mama Kathure what had happened although initially she feared that they would beat her. She was later taken to the police station and later to hospital where she was issued with a P3 form.

**PW2 E M** testified that on 14th April 2009, he had sent his child (PW1) to the shop to buy sugar and tea leaves but she stayed long and came back crying. On interrogating her, PW1 told him that on her way back from the kiosk, she met with the appellant on the way who dragged her into his house whereupon he undressed her and defiled her while threatening her with a *panga*. He later reported the incident to Nkumu Police Station and the following day they were referred to hospital.

**PW3 L K M**, corroborated PW2's evidence by testifying that on 14th April 2009, they had sent their child (PW1) to buy sugar and tea leaves. PW1 took long to come back and upon returning, and on being interrogated, PW1 told them that she had met the appellant on the way who defiled her. They later reported the incident at Ntumu Police Station.

**PW4 J K** testified that on 14th April 2009, PW2 who was her neighbor came to her house calling and asked her to follow him. She followed him and on reaching PW2's house, she found PW1, 2 and 3 and their young children and asked what the problem was. PW1 then told her that she had been defiled. PW4 advised that they report to the police station as that was a serious matter. She escorted them to the police station, reported the matter and the next day they took PW1 to hospital.

**PW5 CORPORAL PATRICK GIKUNDI**, the investigating officer in this case testified that on 14th April 2009, he met the appellant, a person he knew very well being escorted by other villagers and a girl called MK (the complainant) whereupon PW1 informed him that she had been defiled by the appellant. He also found one PC Njerica Makaibe who had been requested to check on the girl (the complainant) who indeed observed that she had been defiled. Both the appellant and PW1 were escorted to hospital under the escort of PC Makaibe and her parents where PW1 was examined and issued with a P3 form.

**PW6 JOSEPH MWENDA** is the clinical officer who examined the complainant and filed the medical report. He testified that the complainant had a broken hymen and abrasions on the vaginal walls and that there was a bloody discharge through the vaginal opening with pus cells a confirmation that the complainant had indeed been defiled.

The appellant was placed on his defence and he called three witnesses. He testified that on the material day, he was playing darts with his friend when he heard a voice and saw his friend MK (PW1). They went with her to his house and he put the radio on and stayed for 30 minutes. He then took her home and bought her three sweets and as he returned home he met one Mutembei and Micheni who asked him which child he had defiled. Micheni then started to beat him. He further testified that he had a grudge with Mutembei and that Mutembei beat MK (PW1) and forced her to say that the appellant had defiled her.

**DW2 DAVIS MUGAMBI** testified that on 14th April 2009, he was from the market and when he got near Mwiria Police Station, he found the appellant seated with a lady at around 5.00 to 6.00 p.m. He passed through the home to the appellant's uncle and sat with him as he repaired his bicycle. The appellant came first and later a lady followed him and they entered in the appellant's house and stayed there and later came out.

**DW3 ALEX KABURU** testified that on the material day, at around 5.30 p.m. he was at home when he saw the appellant coming with a girl he did not know. They entered the house and stayed there for about 30 minutes and then left. The following day, he heard that the appellant had been arrested.

**DW4 MARGARET THIRINDI** testified that on 14th April 2009, the appellant was near her shop playing darts with an officer called Gikunda, when PW1 came to buy sugar. She bought the sugar and told her not to give it to her as she would come for it later. PW1 then called the appellant and they left together. PW1 then came back for the sugar and the appellant bought three sweets and gave one to her child and the other to PW1. They then left and one Mutembei came with a stick looking for the appellant. She then went out and found the appellant, Micheni and Mutembei and Mutembei said that the appellant had raped his daughter and started beating him. DW4 told Mutembei to stop beating the appellant because PW1 and appellant always spent time together but he threatened her. She further testified that the appellant and PW1 were friends.

I have considered the submissions by the Counsel and the authorities relied upon by the appellant and the grounds of appeal. In addition, I have reevaluated the evidence on record. The appellant in the instant case faced a charge of defilement contrary to Section 8 (1) of the Sexual Offences Act. The complainant was alleged to have been 14 years old at the time. In a charge of defilement, ordinarily the prosecution cites the section creating the offence and the section providing for the penalty. Section 8 (1) of the Sexual Offences Act provides as follows:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."***

Section 8 (3) thereof provides for the penalty as follows:

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

The charge sheet as drafted omitted to state the penalty section. Since it was alleged that the complainant was aged 14 years at the time, the appellant ought to have been charged with the offence of defilement contrary to Section 8 (1) of the Sexual Offences Act as read with Section 8 (3) of the same Act. The question is whether failure to cite the penalty section is fatal to the charge. Section 134 of the CPC provides for what the ingredients of a charge will be. It reads:

> ***"Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences which the accused person is charged together with such particulars as may be necessary after giving reasonable information as to the nature of the offence charged."***

In the case of ***Isaac Omambia v Rep (1995) KLR*** the Court considered the above section when it stated:

> ***"In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the CPC which includes particulars of a charge as an integral part of the charge. Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."***

It is enough that the charge contains information on the nature of the offence and the particulars. In the instant case, all the necessary particulars and information regarding the nature of the offence were included in the charge. The subsection which was omitted only deals with the penalty to be meted in the event of a conviction. In my view, the omission to state the section was not fatal to the charge. In any event, such omission would be cured by Section 382 of CPC which states:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure or justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

Failure to include the penalty section was not prejudicial to the appellant.

With regard to the second ground of appeal, it was contended that the Learned Trial Magistrate erred in law and fact in conducting the proceedings in a language that is unverifiable from the proceedings and which the appellant did not properly comprehend. I have perused the proceedings of the lower court and I am in agreement with the assertions by the appellant that the same were poorly taken. When the appellant first took plea on 16th April 2009, it was indicated that the interpretation was in English, Kiswahili and Kimeru. When the charge was read out to the appellant it was recorded as follows:

> ***"Charge read out and explained to the accused in a language that she/he understands and who replies …."***

Even though it was stated that the charge was read out to the appellant in a language that he understood, the said language was not indicated. Similarly, the Learned Trial Magistrate did not indicate the language that PW1, 2, 3, 4, 5 and 6 used to testify. This was a serious omission on the part of the Learned Trial

Magistrate but in my opinion, it did not prejudice the appellant in anyway. In saying so, I am guided by the decision of the Court of Appeal in ***George Mbugua Thiongo V R, Criminal Appeal 302 of 2007*.** In that case the Court stated that:

> ***"For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."***

In the instant case, it is clearly evident that the appellant understood and followed all the proceedings during his trial. He did not complain about the issue of language in the trial court. He even requested the court to recall the complainant for cross examination as he did not have the statements during the hearing which request was acceded to by the trial court. Similarly, when another magistrate took over this case, the requirements of Section 200 of the Criminal Procedure Code were explained to the appellant and he intimated to the court that he would like to proceed with the matter from where the other magistrate stopped. If he had not followed the proceedings this was an opportune time to request for starting the *case de novo.* Consequently nothing turns on this point.

On whether or not the complainant should have undergone a *voire dire* examination, it was alleged that the complainant was aged 14 years at the time of the commission of the offence. I have looked at the proceedings of the lower court and indeed no *voire dire* was conducted on the complainant. The Court of Appeal gave its guidance on the issue of *voir dire* examination in ***Johnson Muiruri V R [1983] 447*** at pages 448-450 as follows:

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.***
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> ***In Peter Kariga Kiune, Criminal Appeal No. 77 of 1982 (unreported) we said:***
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> ***"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a*** *voire dire* ***examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to the convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap 15. The evidence Act (section 124, cap 80).***
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> ***It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."***

Under Section 124 of the Evidence Act Cap 80 of the Laws of Kenya, the court only needs to be satisfied that the child is telling the truth. The trial magistrate did not record its decision as to whether the child was possessed of sufficient intelligence and whether she appreciated the importance of telling the truth. The law requires that the child of tender years be subjected to *voire dire* examination. Section 2 of the Children's Act defines a child of tender years as a child under the age of ten years. If indeed PW1 was 14 years old, then *voire dire* examination may not have been necessary and I believe the court must have observed the said child and appreciated she was about that age of 14 years but should have stated so.

The next complaint is that the age of the complainant was not established. The complainant testified that she was 14 years old at the time of the commission of the offence. No other evidence was called to ascertain the complainant's age and the Learned Trial Magistrate did not call for an age assessment report. In the case of ***Hilarly Nyongesa V R (Eldoret Criminal Appeal No. 123 of 2009*),** Mwilu J as she

then was rendered herself thus;

> ***"age is such a critical aspect in Sexual Offences that it has to be conclusively proved … and this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim. I agree and add that while the court may in certain circumstances rely on evidence other than age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view, constitute such proof".***

Though the above decision is a judgment from a court of a concurrent jurisdiction, I wholly associate myself with the sentiments expressed above by Mwilu J. Recently, this court in the case of ***David Mutugi Kamwara V R (Meru High Court Criminal Appeal No. 54 of 2011)*** which authority has been relied upon by the appellant stated as follows as regards age in defilement cases:

> ***"age is a primary determinant of the sentence to be meted out upon conviction. In this case PW1 said that she was 8 years at the time of the trial. The mother did not tell the court how old her daughter was. The P3 form indicates that her age was estimated at being 8 years. The prosecution did not produce the birth certificate, notification of birth nor was PW1's age assessed by a dentist or radiologist. PW1's age was not ascertained and one of the key ingredients of the offence of defilement 8 (2) was not proved."***

Having found that one of the key ingredients of this offence, namely age of the complainant, was not proved, I find this ground to be merited. However, if the court found that another sexual offence had been committed, then I would proceed as if the complainant were an adult and proceed to convict the appellant of rape under Section 3 or sexual assault under Section 5 of the Sexual Offences Act.

The last ground of appeal is that the appellant was wrongly convicted in proceedings that were conducted contrary to the provisions of the Children's Act No. 3 of 2001. Section 186 (b) of the said Act provides as follows:

> ***"186. every child accused of having infringed any law shall-***
>
> ***(b) if he is unable to obtain legal assistance be provided by the government with the assistance in the preparation and presentation of his defence."***

I have perused the court file and observed that when the case commenced, there was nothing recorded in the proceedings that could have suggested that the appellant was a child. He did not inform the court when the trial commenced until his defence when he claimed to be 17 years old. It seems the court did not observe that he was a minor so that it could call for an age assessment. The court cannot therefore be faulted for not invoking Section 186 of the Children's Act to avail Counsel for applicant during the trial. However, when the appellant raised that issue during his defence, the court should have stopped there and had his age assessed before going ahead to prepare a judgment and reading it. If he had been found to have been underage at that stage, the court should have sent the file to the High Court for review because under the above Section, the proceedings are irregular because the appellant was not accorded representation by Counsel. It is only after the judgment that an age assessment was done. The court observed that the appellant was assessed at 18 years of age, that is on 29/7/2010. The offence had been committed in April 2009 which meant that the appellant was a minor at the time he was charged and the provisions of the Children's Act were applicable. The trial court fell into grave error when it went ahead to sentence the appellant to prison. The best it would have done was to proceed to deal with him under Section 191 of the Children's Act – where the different methods of dealing with children is provided for.

A serious miscarriage of justice was committed by the trial court when it sentenced the appellant to 20 years even after learning that he was only 18 years at that time. The appellant has been in prison since 27/7/2010 – 5 years. This court cannot even consider issue of the proceedings being a mistrial. The proceedings were irregular, the conviction unsafe and is hereby quashed and sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

I further direct the Deputy Registrar of this court to serve a copy of this judgment to the trial court for its own record and information.

**DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF OCTOBER, 2015.**

**R.P.V. WENDOH**

**JUDGE**

**9/10/2015**

**PRESENT**

Mr. Mulochi for State

Mr. Igweta Holding Brief for Mr. Muriithi for Applicant

Peninah, Court Assistant

Appellant, Present