M.W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from original conviction and sentence in Mutomo Senior Resident Magistrate's Court*

***Criminal Case No. 198 of 2010 by Hon. S.M. Mutai -S.R.M on 19.10.2010*)**

JUDGEMENT

1. This is an Appeal from the conviction and sentence of the Appellant, M.W, at the Mutomo Senior Resident Magistrate's Court with the offence of defilement of a child of twelve years old. Since the soundness of the charge is one of the grounds raised on appeal, it is imperative to set out verbatim its contents. It read as follows:

DEFILEMENT CONTRARY TO SECTION 8(1)(2) OF THE SEXUAL OFFENCE ACT NO. 3 OF 2006

M.W: On the 8th day of October, 2010 at around 6:00 PM at Mutomo District of the Eastern Province defiled K.M a child aged 12 years.

2. The Appellant was presented before the Senior Resident Magistrate on 15/10/2010. According to the Court record, the following transpired during the plea session:

"Accused – Present

Language – English/Kikamba

Charges read to the accused person in a language he understand and on being asked he replies:-

Accused: It is true

OP: I pray that the matter be mentioned on Monday for facts and exhibits."

3. On the 18/10/2010, the following happened as recorded:

"Accused – Present

Language – English/Kikamba

CP – The facts are ready. The age of the accused is 18 years old.

CP – The facts are that on 08/10/10, the Complainant one KM, a girl aged 12 years and a pupil at K Primary School was on her way from school when she met the accused. The accused was armed with a

knife. He pulled the complainant to the bush [and] removed her pants. He defiled her Complainant (sic) raised alarm but nobody came for her rescue (sic). The accused then disappeared to the bush. Complainant told her parents what happened. Complainant was taken to M Dispensary and she was issued with a P3 form. A skirt was torn during the defilement and inner pants recorered. I produce the skirt and pants as exhibits 1 and 2. I also produce the P3 form as an exhibit. Accused was arrested and charged before the Court. That's all.

Accused: Facts are true

Court: Accused convicted on his own plea of guilty."

4. Having thus convicted the Appellant, the Learned Magistrate proceeded to sentence the Appellant to twenty years imprisonment. This, therefore, set the stage for the present appeal. Through his counsel, Mr. Kilonzi, the Appellant raised three key arguments on appeal. I will set them out next.

5. First, the Appellant argues that the charge was defective. Mr. Kilonzi submitted that on its face the charge sheet says the charge is preferred under section 8(1)(2) of the Sexual Offences Act. However, there is no such section in the Sexual Offences Act (the "Act"). There is only section 8(1) which creates the offence of defilement. Section 8(2) of the Act and subsequent subsections deal with different offences. Mr. Kilonzi argued that the proper provision under which to charge the Appellant should have been section 8(1) as read together with section 8(2). Since the Appellant was charged with a non-existent offence, Mr. Kilonzi argued that it followed that the charge was fatally defective. He added that the defect was material because it made it impossible for the Appellant to understand the nature of the offence he was facing.

6. Second, Mr. Kilonzi argued that even though the Appellant was convicted on his own plea of guilt, the plea was, in fact, equivocal. He complained that although the record indicates that the charge was read in a language the Appellant understood, that language was not specified. It was therefore unsafe, Mr. Kilonzi argued, to sustain a plea of guilty.

7. Third, the Appellant complained that the whole trial, conviction and sentencing were un-procedural and illegal since the whole process was in contravention of the Children's Act. In particular, Mr. Kilonzi raised three arguments in this respect. All these arguments have as their basis the contention of the Appellant that he was a minor at the time of his presentment before the Learned Magistrate. He contended that he was only sixteen years old, and therefore, a minor under the Children's act. As such, he was entitled to certain protections and procedures under the Children's Act. In particular, he raises the following arguments:

8. One, under the Child Offenders Rules (Fifth Schedule) to the Children's Act, especially section 4 thereof, the Appellant should not have been interviewed and presented to Court without first informing his parents or guardian or without a lawyer being present. Yet, that is exactly what happened here: the Appellant was arrested, interviewed at the Police Station, presented to Court and a plea of guilty entered in short succession – all without either of his parents being informed.

9. Two, Mr. Kilonzi submitted that the Senior Resident Magistrates Court did not, at least at the time of the trial, have jurisdiction to try the Appellant. This is because, Mr. Kilonzi argues, Mutomo Court had not been gazetted as a Children's Court. As such, the proceedings were against the provisions of sections 184-185 of the Children's Act.

10.Finally, Mr. Kilonzi argued that there was a total breach of the rights of the Appellant given that he was convicted in an adult court and sentenced to serve in an adult prison where he was incarcerated until this Court released him on bail pending appeal. This was in total disregard to section 186 of the Children's Act.

11.On his part, Mr. Mwenda, Learned State Counsel, conceded the appeal. He indicated that the State had no interests in trying the Appellant as an adult. He did not contest the interpretation or application of the

provisions of the Children's Act cited by the Appellant's counsel. However, Mr. Mwendwa urged the Court to order for a retrial. In doing so, he argued that while the Charge Sheet was technically defective, it was not fatally so. That defect, he argued, could be cured under section 382 of the Criminal Procedure Code. He pointed out that the offence alleged was a serious one. There was a victim who was traumatized by the crime. He argued that there was sufficient evidence to convict the Appellant if a re-trial is ordered.

12.On my part, I have perused through the entire record of the lower Court as I am obliged to do as a first appellate Court (see ***Okeno v Republic*** [1972] EA 32). I have also considered the submissions of both counsels. I have come to the conclusion that, ultimately, this appeal must succeed on all the grounds submitted by Mr. Kilonzi. It was, therefore, right for Mr. Mwendwa to concede.

13.First, I am not persuaded by Mr. Mwenda's argument that the defect in the charge was, in this case, merely a technical one which could be cured under section 382. The starting point for this analysis is our case law. Two cases are pertinent: the case of ***Yosefa v. Uganda*** [1969] E.A. 236 – a decision of the Court of Appeals – and ***Sigilani v. Republic*** [2004] 2 KLR 480 – a High Court decision by Justice Kimaru. Both hold that a charge sheet is fatally defective if it does not allege an essential ingredient of the offence. ***Sigilani*** held:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

14.The test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? In this case, the Appellant was charged under section 8(1)(2) of the Act. Mr. Kilonzi is right that no such section exists in the Act. Suppose we were to treat this as a technical defect and seek to cure it, what would the modified charge sheet read? Perhaps it would read 8(1) as read together with 8(2). The first problem here is that it would be asking the Court to fill too many omissions for the Prosecution. The second problem is that even if so cured, the offence disclosed thus would be at variance with the details in the charge itself: Section 8(2) of the Act speaks of defilement when the victim is below eleven years old; yet the charge sheet and the facts presented to Court indicate that the victim was twelve years old. In my view, therefore, the Charge Sheet was fatally defective and is not amenable to cure under Section 382 of the Criminal Procedure Code.

15.Second, I would similarly agree with Mr. Kilonzi that the plea of guilty here is not unequivocal. Our case law establishes that judicial officers must enter guilty pleas only with the greatest caution and circumspection – especially where the penalty for the offence charged is as serious as the one in this case. The proper procedure was laid down judicially by the celebrated case of ***Adan v. Republic*** (1973) EA 445:

When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused\'s reply must, off course, be recorded." (see also: ***Kariuki v. Republic*** [1984] KLR 809).

16.Aside from the pragmatic guide it gives in taking pleas, ***Adan*** counsels judicial officers to exercise

extra vigilance to ensure that guilty pleas are truly unequivocal. Here, several factors militate against a dispositive conclusion that the plea was unequivocal: first of all, given the relative youth of the Appellant, the Learned Magistrate should have taken a little more care to explain the charge and the consequences of pleading guilty to the Appellant. Second, as Mr. Kilonzi points out, the language in which the Appellant pleaded guilty ought to be specifically indicated. Third, while it may be the simple phrase "it is true" might, at times, be sufficient to indicate unequivocal plea of guilty, it is good practice to interrogate such a "generic" phrase by asking further questions to test to see if the Appellant truly consciously accepts the charge and the facts as presented to the Court.

17.Third, the Appellant is right that the whole trial was in utter contravention of the Children's Act. There is now evidence on record, and the Learned State Counsel forthrightly and admirably conceded that the Appellant was a minor sixteen years of age when he was presented before the Court. It is not denied that the Court was not a gazetted Children's Court. It is equally not contested that the Appellant was interviewed and presented before the Court without the benefit of the company of a parent, guardian or lawyer. The law demands that one of these adults be present. Lastly, Mr. Kilonzo is right that given the age of the Appellant, he should never have been incarcerated in an adult prison. The options for dealing with convicted child offenders are listed in section 191 of the Children's Act – and sending me to an adult prison is not one of the choices. The result of these contraventions of the law is that the Appellant was tried as an adult and devoid of the special procedural protections afforded to minors due to their youth, immaturity or incapacity. He also ended up serving more than two years in an adult prison contrary to the law.

18.By now, it should be fairly clear why the only verdict open to the Court on the Appellant's appeal is to allow it for all the reasons stated above. The only question left to consider is if a re-trial should be ordered as requested by Mr. Mwenda. It is true that the offence alleged is a serious one. It is true that the victim of the crime must have suffered serious trauma. It is true that the witnesses and the evidence might still be available for a subsequent trial. All these are factors which would work in favor of a retrial.

19.However, it is the opinion of the Court that a retrial is inappropriate in the circumstances. It is true that a retrial will generally be ordered when the original trial was illegal or defective as was the case here (see ***Koome v Republic*** [2005] 1 KLR 575]). However, the most important factor to consider in determining whether to order a re-trial or not is whether the interests of justice will be served if it is ordered. In particular, the Courts have to ask if a retrial will cause an injustice to the Appellant.

20.In this case, we have a minor who was processed, tried, and convicted as an adult and hence went through the trauma of the criminal justice system without the protections promised by the Children's Act. At the end of that process, he was also incarcerated in an adult prison where he spent more than two years with hardened adult criminals. I say, since the age of the Appellant is no longer contested, it is time to end the trauma suffered by this minor. It is nearly impossible to have a fair and just trial in this case. The only fair outcome is that this process must be brought to an end.

21.Consequently, the Appeal herein is allowed, the conviction quashed and the sentence set aside. For the reasons set out above, the prayer for retrial is denied. Since the Appellant on bond, the conditions for his release are hereby vacated. He shall be free forthwith. Orders accordingly.

DATED and **DELIVERED** at **MACHAKOS** this **19TH** day of **SEPTEMBER, 2012.**

J.M. NGUGI
JUDGE