REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 330 & 340 OF 1976

JOHN MWANGI MACHARIA

JAMES IKUZA ………….………….APPELLANTS

VERSUS

THE REPUBLIC……………..……..RESPONDENT

JUDGMENT

The appeals against conviction must be dismissed. The magistrate wrote after recording their testimony that he was satisfied that the two complainants under the age of fourteen years understood the nature of the oath before they gave evidence; but for another of the same age he said,

"I am satisfied that she understands the nature of the oath", which leaves us in some doubt whether there was a *voir dire* at all, or a proper one. It must be a preliminary examination of a witness by the magistrate in which the witness is required "to speak the truth" with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (eg she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth). A finding on these points after the person of tender years has testified will not do.

The irregularity is not fatal. These girls were aged thirteen and twelve years, attending a primary school and in standard VII. Their answers to questions were coherent and revealed that they were intelligent. They were competent.

Assuming that their evidence was unsworn and not affirmed, then, there was the evidence of the doctor, an analyst, policemen and their mothers who heard their reports to a corroborate and support their allegations of defilement by each appellant and refute the appellants' testimony that the girls fabricated their evidence because they were interrogated by policemen setting off for a party in Nairobi South B estate at 3 pm on Sunday, 15th February 1976. The magistrate looked for corroboration, found it and drew the same conclusion we have done later when summarising all the evidence.

Neither of these girls, or the appellants, had any injuries on them or on their private parts; but this is not material for defilement. Stains in their underwear and slides from the vaginas of the girls reveal sexual intercourse took place between them and, as the girls were under fourteen years of age, this was

defilement because the appellants did not raise the statutory defence that they had reasonable cause to believe, and did in fact believe, that the girls were of or above the age of fourteen years or were their wives: see section 145 of the Penal Code.

Neither of the appellants' statements on oath was tested in crossexamination which means that the Republic did not challenge it. The magistrate did not touch on this. He did not accept it as true or have any reasonable doubt that it was untrue.

We are satisfied the prosecutor before the magistrate forgot, or did not know, that if the defendant elects to make a statement on oath in his defence he is to be cross-examined on it if it is different from the case for the prosecution and the Court may believe the defence or declare that it raises reasonable doubt if it is not so challenged. The unchallenged evidence of each appellant was, however, in the circumstances, clearly untrue and could not raise any doubt about the truth of the girls' stories in view of all the evidence as a whole, including that of the policeman who caught them all in twos in two separate coaches in a railway siding, the reports by the doctor and the analyst, and that of the mothers of the two girls.

The failure of the prosecutor to cross-examine and challenge the appellants' denials on oath in this case is not fatal to the conviction. We hope, in future, that magistrates will ask a prosecutor who does not cross-examine a defendant on his sworn defence statement, if it is different in any material respect from the prosecution case, whether or not the prosecutor's instructions are that the defence is, or might be, true and exculpatory; and if the prosecutor says they are not so, the magistrate should advise him to cross-examine and challenge it. The defendant has selected this way of making his defence knowing that he might be challenged with searching questions from the prosecutor designed to reveal to the Court whether or not the defence is true or results in the prosecution's failure to prove beyond reasonable doubt the defendant guilty of the offence charged or any other one open to it on the relevant facts adduced and the law.

[His lordship then considered the appeals against sentence. He found that the sentences imposed by the magistrate were manifestly excessive and substituted a sentence of two years' imprisonment with hard labour and six strokes corporal punishment on each appellant.]

Appeals agaisnt convictions dismissed.

Appeals against sentences allowed in part.

Dated at Nairobi this 15th day of September 1976

A.A. KNELLER

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JUDGE

H.G.PLATT

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JUDGE

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