REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 166 OF 2009

M K M.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Being an appeal from the Judgment of Honourable B. Kituyi Resident Magistrate, delivered on 8th June, 2009 in Nakuru Chief Magistrate's Court Criminal Case No. 31 of 2009)

JUDGMENT

1. GW was seven (7) years old in 2009. This is her sad story. The date was 26/01/2009. It was late at night – around 10:00pm. Her mother, H W, stepped out of their house to go draw some water from the adjacent plot. She left GW in the house under the ostensible care of M K M, her husband of four years. H W had no inkling or premonition anything would go wrong.

2. Immediately H W stepped out of the house, GW went to her bed. M K M followed her there. He removed her trousers and panties. He then lowered his own trousers and panties. In GW's words, the following happened: "*aliweka kitu yake ya susu kwa kitu yangu ya susu*." Graphically translated: He took his penis and inserted it in my vagina.

3. According to GW, it was not the first time this had happened. Indeed, the doctor who examined GW the day after the incident found her to be unhappy; verging on depression. Fortunately, for GW, it was the last time it happened. For the mother came into the room from her errand and found M K M almost literally in the act: his penis hanging out; his trousers lowered. Inside the bedroom, she found GW with her trousers lowered as well.

4. Harriet immediately raised alarm and went to call a neighbor, Baba Musa, to report what she had seen. Meanwhile, M K M acted in ostensible self-indignation – picking up a big quarrel with his wife to the extent of kicking both the wife and GW out of the house that night. H W and GW went to find refuge the same night at H W's sister's house in the same neighbourhood. Harriet's sister's name is J M. The following morning, they reported to Bondeni Police Station. They were issued with a P3 Form which they took to Nakuru PGH Hospital.

5. At the hospital, they found Dr. Daniel Wainana as the examining doctor. Upon examining GW, Dr. Wainaina found a "stable but depressed" child. Her hymen was missing and consistent with continuous defilement. He found spermatozoa in her genitalia. GW also had signs of infection – including pus cells. She was put on antibiotics. The doctor concluded that there was continuous defilement.

6. This story emerged from the testimony of GW in the criminal trial of M K M. GW, the complainant, testified as PW2. H W, GW's mother, was PW3. J M was PW4. Dr. Wainaina testified as PW 1. PC Eunice Chepngetich, the Investigating Officer, shored up the evidence of the Prosecution as PW5.

7. The charge facing M K M was defilement "contrary to Section 8 (1) (4) of the Sexual Offences Act 2006." He also faced an alternative charge of indecent act on a child contrary to section 11 (1) of the sexual offences Act 2006. Particulars of the offence were that on the 26th day of January 2009 in Nakuru District of the Rift Valley Province, M K M intentionally had sexual intercourse with GW, a girl aged 7 years. Particulars of the alternative were that on the same day 26th January 2009 in Nakuru within the Rift Valley Province he unlawfully and indecently assaulted GW, a girl aged 7 years old by touching her genital organs using his genital organ.

8. At the conclusion of the Prosecution case, the Learned Trial Magistrate placed M K M on his defence. He rendered a straight denial – in essence claiming that his wife – H W – had cooked up the story to hit back at him for complaining about her coming home late. His story was that after he quarreled with H W, both H W and GW left and that, therefore, it is not possible that he defiled GW on the same night.

9. The Learned Trial Magistrate disbelieved M K M's testimony and found the Prosecution witnesses believable and consistent. He proceeded to convict M K M of the main offence charged and convicted him to life imprisonment.

10. M K M is dissatisfied with the conviction and sentence and has appealed to this Court. He raised the following grounds of appeal – some

of which he combined in his written submissions.

11. Mr. Motende opposed the Appeal on behalf of the State. He argued that there was sufficient evidence to convict the Appellant of the charge of defilement but conceded that given some discrepancy in the charge sheet, the appropriate sentence should have been fifteen years imprisonment. Mr. Motende told the Court that there was enough evidence to show that the complainant was a minor; that there was penetration; and that it was the Appellant who caused the penetration. However, he conceded that since the charge sheet appeared to mention section 8(4), the magistrate should have imposed a sentence of fifteen years imprisonment which the penalty imposed under that section.

12. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (**1957) EA 336**, ***Ruwala vs. R*** **(1957) EA 570**.

13. The Prosecution was required to prove three critical ingredients to establish the offence:

a. That the Complainant was under-age – in this case less than eighteen old (See section 9(1) of the Sexual Offences Act);

b. That there was an attempt by the Appellant to penetrate the genital organs of the Complainant (see section 2 of the Sexual Offences Act for the definition of penetration); and

c. That it was the Appellant who attempted the penetration.

14. Before turning to the ingredients, I will address the major complaint raised by the Appellant on appeal: that the charge sheet was, in his view, fatally defective. The complaint seems to be that the Appellant thinks that the charge sheet should have contained the words "intentionally and unlawfully".

15. The Court of Appeal had occasion to deal with this question in ***JMA vs Republic [2009] KLR 671***. The High Court had quashed a conviction on the main charge of defilement and found the appellant guilty on the alternative charge because the charge sheet did not contain the words "intentionally and unlawfully" making the main charge fatally defective. On that question, the Court of Appeal held that:

> This was a case in which the superior court should have invoked the provisions of Section 382 of the Criminal Procedure Code to cure the irregularity which on the facts and circumstances of this matter was minor.

16. The same applies here. In any event, looking at the wording of the various sub-sections in section 8 of the Sexual Offences Act, I am not persuaded that the words "unlawfully and intentionally" are necessary. The sections are quite clear that any penetration or attempt at penetration on a child, without more is a violation of the act; it is *per se*, unlawful.

17. However, in the present case, Mr. Motende is right that the charge contained a discrepancy which should have been resolved in favour of the Appellant when it came to sentencing. The charge sheet charged the Appellant with an offence "contrary to section 8(1)(4) of the Sexual Offences Act." Of course, there is no such section. The aim was to charge the Appellant under section 8(1) as read together with section 8(4) of the Sexual Offences Act. While the typographical error is curable under section 382 of the Criminal Procedure Code, the fact is that the charge sheet seemed to disclose an offence punishable by a maximum of fifteen years imprisonment under section 8(4) of the Sexual Offences Act. Hence, while the evidence tendered was unequivocal that the victim was seven years old, it would be unfair to impose a penalty under section 8(2) of the Sexual Offences Act.

18. The age of the Complainant was proved through oral testimony by the Complainant and her mother (PW2). The P3 form also established that the Complainant was less than eighteen years old.

19. On appeal, the Appellant says that the age of the Complainant was not proved. He relies on ***Hillary Nyongesa v R (Eldoret High Court Crim. App. No. 123 of 2009)*** and ***John Cardon Wagner & Others v R [2009] eKRL***.

20. Our case law has now established that the age of a Complainant for purposes of sexual offences can be established by any credible evidence. The Court of Appeal in ***Mwalongo Chichoro Mwanjembe v Republic, [2015] eKLR*** has recently stated this:

> **…**the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See ***Denis Kinywa v R, Cr. Appeal No.19 of 2014*** *and* ***Omar Uche v R, Cr. App.No.11 of 2015***. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in ***Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000***. *We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable…*

21. In the present case, given my holding above, the Prosecution was required to prove beyond reasonable doubt that the Complainant was less than eighteen years old. The Prosecution clearly met this threshold: there was sufficient evidence to prove that the Complainant was a

child as defined in the Sexual Offences Act.

22. Penetration was proved by the oral evidence of the Complainant as well as the medical evidence by Dr. Wainaina. The Complaint was quite straightforward and consistent in her testimony about what happened. Her testimony was corroborated by the medical findings of Dr. Wainaina who examined her and found an absent hymen and spermatozoa present in her genitalia as proof of recent sexual intercourse. That evidence was further strengthened by the testimony of the GW's mother, PW3, who testified that she chanced on the Appellant with his penis hanging out and trousers lowered coming out of the room where she found the complainant with her trousers and panties equally lowered. The tell-tale sign coupled with the straightforward testimony of the Complainant and that of the doctor establish the fact of penetration beyond reasonable doubt.

23. Last, was there enough evidence to show that it was, indeed, the Appellant who committed the act of penetration? Absolutely. The mutually reinforcing evidence presented by the Complainant, her mother, and J M, establish that it was the Appellant who penetrated the Complainant with his penis. The Complainant testified candidly and remained steadfast and consistent in her testimony. Even though she should not have been cross examined since she gave an unsworn statement, she was, in fact, cross examined but her narrative remained consistent. Her mother, added to the narrative by testifying about the scene she found when she came from fetching water. Finally, J M confirmed that the Complainant's mother and the Complainant reported to her what had happened shortly after it happened – and sought refuge in her house. This adds credibility of the Prosecution narrative.

24. In view of the above, there is no question that the conviction in this case was quite safe. I hereby affirm it. On sentence, as I pointed out above, the discrepancy in the charge sheet should have meant that the Appellant should have benefited from the lower sentence imposed under section 8(4) of the Sexual Offences Act since that is the offence which was disclosed in the charge sheet. To this extent, therefore, the Appeal by the Appellant will succeed only to the extent that the sentence imposed will be reduced from life imprisonment to a term of twenty years in prison. Although the minimum sentence imposed under section 8(4) of the Sexual Offences Act is fifteen years imprisonment and the Appellant was a first offender, I have imposed a higher sentence since there is a glaring aggravating circumstance in this case: the victim literally called the Appellant her father. Although not a biological father and even though no evidence was tendered to prove that the Appellant was legally married to the victim's mother, there was enough evidence to suggest that the Appellant was in a position of loco parentis with the victim. He took advantage of that position of trust to sexually assault the victim. This calls for a higher sentence than the minimum provided for in the statute.

25. Consequently, the conviction is affirmed. The sentence imposed is set aside. In its place, the Appellant shall be sentenced to imprisonment for twenty (20) years.

26. Orders accordingly.

Dated and delivered at Nakuru this 26th day of July, 2018

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J. M. NGUGI

JUDGE