REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 309 OF 2009

E M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDNET

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru Hon. H. O. Barasa –Resident Magistrate delivered on the 22nd October, 2009 in CMCR Case No. 163 of 2007)

JUDGEMENT

The appellant herein **E M** has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Nakuru Law Courts.

The appellant was arraigned before the trial court on 10/7/2007 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8 (1) (3) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On the 7th day of July, 2007 at [particulars withheld] Estate in Nakuru District of the Rift Valley Province, unlawfully had sexual intercourse with a child namely MW aged 14 years".***

The appellant pleaded **'Not Guilty'** to the charge and his trial commenced on 5/12/2007. The prosecution led by **INSPECTOR BARAKA** called a total of five (5) witnesses in support of the charge.

The brief facts of the case were that the complainant child lived with her biological mother and the accused who was the child's step father in a one-roomed house in Njoro. The complainant **MW** testified that on 6/7/2007 while the family were asleep, the appellant left the bed he shared with this wife and joined the complainant and the baby on the floor where they were sleeping. The appellant uncovered the complainant and proceeded to defile her. During the act **PW2 JWM**, the child's mother woke up to find a man lying on top of her child. The matter was reported to the police. The complainant was taken to the hospital for examination and treatment. The appellant was arrested and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto this defence. He gave a sworn defence in which he denied the charge.

On 22/10/2009 the learned trial magistrate delivered his judgment in which he convicted the appellant for the offence of Defilement and sentenced him to serve 26 years imprisonment. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

Being a first appeal this court has an obligation to re-examine and re-evaluate the evidence adduced during the trial and to draw its own conclusions on the same **[see AJODE Vs REPUBLIC [2004] 2 KLR].**

In this case the appellant pleaded in his petition of appeal, that the learned trial magistrate erred in convicting him yet the age of the complainant had not been proved. **MR. CHIGITI** learned State Counsel opposed this ground and submitted that the age of the complainant had been proved during the trial to be 14 years old.

In Defilement cases the age of the victim is a crucial issue. It is a fact which requires proof beyond reasonable doubt. In **ALFAYO GOMBE Vs REPUBLIC 2010 eKLR** the Court of Appeal in discussion the centrality of age in defilement cases. Commented thus

> ***"In its wisdom Parliament chose to categorize the gravity of that offence [Defilement] on the basis of the age of the victim, and***

consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence……."

Similarly in the case of **KAINGU ELIAS KASOMO Vs REPUBLIC HC Criminal Application No. 504 of 2010**, the Court of Appeal sitting in Malindi held as follows:-

"We now turn to the perplexing issue of the age of the complainant. Age of the victim of a sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim….."

The question then is how is age to be proved satisfactorily? Ordinarily this would be by production of documentary proof of age e.g a Birth Certificate, Immunization Card, Baptism Card, School Document or other official documents in which the child's date of birth is stated. However in the absence of such documentary proof of age the evidence of a parent or guardian confirming the date when the child was born would suffice **(see WAHOME Vs REPUBLIC ……..)**

In this particular case no document to prove the age of **PW1** was produced the trial. The particulars in the charge sheet did not specify the age of the child. This was a crucial omission.

The complainant herself did not either during the ***'voire dire'*** examination or in the course of her testimony say how old she was. Likewise **PW2** who was the biological mother of the child did not testify as to the date when she delivered the complainant or how old her daughter was. The failure of the prosecutor to lead evidence in this regard was a serious omission in the case. The investigating officer also failed to obtain any documentary proof of the child's age.

I have looked at the P3 form to see if it provides any proof of the victim's age. I note that the age of the child was cancelled on the P3 form and was amended to read 11 years. The cancellation is not initialed and **PW5, TABITHA NGUGI**, the clinical officer who produced the exhibit did not mention having made that alteration. Thus this document cannot be relied upon as proof of age. Contrary to the submissions of the learned State Counsel no immunization card was produced as an exhibit in this case.

Therefore there is no proof or clarity regarding either the date of birth or the age of the complainant. A critical aspect of the charge of defilement remained unproven. This was an omission which was fatal to the prosecution case.

A side from this failure to prove the age beyond reasonable doubt, I have noted certain other anomalies which weaken the prosecution case.

During the course of the trial the appellant made at least two applications to have **PW1** and **PW2** re-called for further cross-examination. Despite noting the extremely serious nature of the charge the learned trial magistrate declined both times to have the two witnesses re-called. On 7/11/2008 the trial magistrate in his ruling on this matter disallowed for the second time the application to re-call those witnesses.

For the very reason that the offence was serious I believe the trial court ought to extend the latitude to re-call the witnesses. All this is to ensure that the appellant a lay person who was representing himself is accorded a fair trial.

All in all notwithstanding the strength of any other available evidence, I find that the failure to prove the complainant's age during the trial rendered the appellant's conviction unsound. For this reason alone, I allow this appeal and quash the appellant's conviction. His subsequent sentence of 26 years in jail is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Nakuru this 19th day of June, 2017.

Appellant in persons

Mr. Chigiti for State

Maureen A. Odero

Judge