**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 42 OF 2015**

**JEREMIAH KAMAU MACHARIA……….……………...……..APPELLANT**

**VERSUS**

**REPUBLIC…………………………………………………..RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu Criminal Case No. 2837 of 2012 delivered by Hon.C. C. Oluoch on 3rd January, 2014).*

## JUDGMENT

The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The particulars of the offence were that between the month of April, 2011 and August, 2012 at unknown time at [particulars withheld] village in Kiambu County, unlawfully and intentionally committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of H W K, a child aged 17 years. The Appellant was tried, convicted and sentenced to serve 17 years imprisonment. He was dissatisfied with both the conviction and sentence and proffered this appeal.

In a memorandum of appeal filed and dated 17th March, 2015, he raised the following grounds of appeal:

1. That the learned Magistrate erred in fact and Law in convicting the Appellant to a fifteen year jail term (15) when the complainant on cross examination stated that she had been defiled by one Rufus Macharia in 2002 and not the Appellant.
2. That the learned trial magistrate erred in Law and fact when she admitted the evidence of PW3 and 4 by taking the Appellants blood samples for DNA analysis without his consent while the child was not born and relying heavily on the said evidence to convict the Appellant.
3. That the learned trial Magistrate erred in Law and fact in that the entire judgment and ruling was manifestly excessive, unfair and extremely harsh when the Appellant who is aged 75 years will be required to finish his jail term at 90 years without remission.
4. That the learned trial magistrate erred in Law and fact when she relied on the evidence of PW3 the Clinical Officer Karuri Hospital who never examined the state of the complainant's genitalia but only extracted blood samples from the accused and forwarded the same to government chemist for DNA analysis

The appeal was disposed of by way of filing written submissions. Those of the Appellant were filed by learned counsel, Alex Kibunja & Associates on 16th November, 2015. He faulted the learned trial magistrates for finding that the Sexual relationship between the accused and the complainant were

consensual yet went ahead to compute the age of the complainant at 17 years and 7 months. That in that case, all that the Appellant was required to do to disprove the prosecution's case was to advance the defence that at the time of his sexual intercourse with the complainant he believed the complainant had the capacity to consent. The learned magistrate further opined that the Appellant was respectively accorded the defence under Section 8(5) of the Sexual Offences Act which provides that a trial court can uphold an accused person's defence if at the time of the Sexual intercourse between an accused and the child the accused believed the complainant was of the age of the majority or presented herself to be of the age of majority. It was therefore an error that the learned trial Magistrate went ahead and convicted the Appellant.

Learned counsel faulted the ultrasound images that were done at Banana Hill Hospital which indicated that the complainant at the time the offence was reported and the scan was done on 25th September, 2010, was 21 weeks one day pregnant. That evidence, according to the counsel, was sharply contradicted by complainant's own evidence in cross examination that she was five months pregnant. Furthermore, another pregnancy test done on 26th September, 2010 indicated that the pregnancy was 21 weeks old.

Learned counsel further submitted that the DNA examination report submitted to the government chemist could not be relied on to prove that it was the Appellant who had impregnated the complainant. According to the counsel, the blood samples of the Appellant were extracted on 10th October, 2012 by PW3, Richard Munene, a Clinical Officer from Karuri Health Centre. Unfortunately, the samples were forwarded to the Government Chemist 6 months later. There was no evidence that Karuri Health Centre had a facility to preserve the blood for the period of six months. More interesting was the fact that the blood samples that were forwarded had labels of the names of both the Appellant and the complainant. As such, the results of the DNA test ought not to have been relied on as genuine and independent proof that it was the Appellant who had impregnated the complainant.

Finally, counsel submitted that the sentence meted against the Appellant was manifestly harsh and excessive in the circumstances.

On behalf of the Respondent, learned State Counsel Ms. Nyauncho filed written submissions on 1st February, 2016. She submitted that the Appellant was well known to the complainant and according to the complainant he started defiling her sometime in April, 2012. The ultra sound examination from Karuri Health Centre indicated that the complainant was twenty one (21) weeks pregnant. In addition, a DNA test at the Government Chemists confirmed that the child was sired by the Appellant. She conceded that there was variation in the date of birth of the child born by the complainant. According to PW3, a Clinical Officer, the child was born on 27th January, 2013. The said Clinical Officer had examined the complainant on 28th February,2012, and found her to be 18 weeks pregnant which was not an accurate date. However, in the view of Miss Nyauncho, the error was curable under Section 382 of the Criminal Procedure Code. Finally, she submitted that the Appellant could not enjoy a defence under Section 8(5) of the Sexual Offences Act as he knew that the complainant was a minor and he went ahead and defiled her. Furthermore, at the trial he did not advance the defence that at the time he had sexual intercourse with PW1, he reasonably believed that she was above 18 years.

In view of the above submissions, it is now the duty of this court to determine whether the prosecution proved its case beyond any reasonable doubt. This being the first appellate court its duty is to re evaluate the evidence on record and come up with its own conclusions but bear in mind that it has neither seen the witnesses nor heard their evidence and give due regard for that.

The prosecution's case was that the complainant who testified as PW1 was well known to the Appellant who lived one kilometer away from her home. They both came from the same clan. Sometime in April, 2012, PW1 went to the home of the Appellant. He found him sitting in the living room. A few minutes later, he asked her to go to the bedroom with him but she declined. The Appellant pulled her into the bedroom and ordered her to climb onto the bed. He demanded that she removes her pants and all the other clothes she was wearing. Thereafter, he defiled her without using protection. She later returned home but did not tell anyone what had happened. After sometime, she reported to a Mama G N that she

was feeling dizzy. The lady took her to Muchatha Dispensary from where they were referred to Karuri Health Centre. It was confirmed that she was pregnant. Nyambura informed PW1's father who in turn informed her mother. On enquiry, PW1 told her mother that the Appellant had been having sex with her. According to PW1, she had burnt her leg sometime in the year 2011 and was admitted at Kenyatta National Hospital. She was an epileptic girl. Whilst in hospital the Appellant used to visit her as both were well known to each other.

**PW2**, **G W K,** the mother of PW1 confirmed that PW1 suffered from epileptic disorders since she was one year and six months old. She recalled that on 24th August, 2012, her daughter in law one A N called her by telephone and informed her that PW1 was unwell as she was suffering from a headache and dizziness. She advised her to take her to Muchatha Health centre. It was at the hospital that it was confirmed that PW1 was pregnant. On enquiry from PW1, she told her that the pregnancy belonged to the Appellant. She reported the matter to the Assistant Chief at Muchatha and thereafter at Karuri Police Station. On 25th September, 2012, a pregnancy scan done at Banana Hills Hospital showed that PW1 was 21 weeks and one day pregnant. She was later examined at Karuri Health Centre where her P3 form was filled.

**PW3, Richard Munene** of Karuri Health Centre produced the P3 form of PW1. His testimony was that as at 28th August, 2012 PW1 was 18 weeks pregnant. According to PW3, the report was that PW1 had been defiled by a person known to her. As at 26th September, 2012, PW1 was 21 weeks pregnant. He noted that she was 17 years old and that her hymen was missing but there were no tears to her genital organ. He proposed that a paternity test be done to confirm who had impregnated PW1. He also produced in court PW1's hospital outpatient card.

**PW4, Henry Kiptoo Sang** was a government analyst based at the Government Chemists in Nairobi. He testified that he received three blood samples from a Corporal Kenga of Karuri Police Station marked 2B belonging to Jeremiah Kamau Macharia, a child, and H W K. He was required to analyze their DNA profiles and determine the paternity of the child. On analysis, he found that at 99.9% Jeremiah Kamau Macharia (Appellant) was the biological father of the child.

**PW5, Police Corporal Hadija Kenga** of Karuri Police Station was the Investigating Officer. She summed up the prosecution's case. Her evidence was that PW1 was a 17 years old girl who suffered from epilepsy. She went to check on her neighbour, the Appellant, who took advantage and defiled her for several months as a result of which she became pregnant. She confirmed that a DNA test confirmed that a child who was born out of the defilement was sired by the Appellant. She preferred the charges against the Appellant.

After close of the prosecution's case, the learned trial magistrate found that the Appellant had a case to answer and was placed on his defence. He gave an unsworn statement which was very brief. He stated that he lived in Muchatha, was married with a wife who had a broken leg and their child was suffering from polio. He concluded that the charges had been trumped up against him.

The first issue for determination is whether the Appellant at this stage of appeal can claim a defence under Section 8(5) of the Sexual Offices Act. The same provides as under:

> ***(5) It is a defence to a charge under this section if-***
>
> > ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
> >
> > ***(b) the accused reasonably believed that the child was over the age of eighteen years."***

According to counsel for the Appellant the trial magistrate alluded that since both Appellant and PW1 were known to each other and had had a long relationship, there was a possibility that the Appellant may

have thought that PW1 was an adult for which reason he ought to have raised a defence under a Section 8(5) of the Sexual Offences Act. Suffice it to say is that throughout the trial, the Appellant did not advance the defence that PW1 deceived him into believing that she was over the age of 18 years at the time he repeatedly had sexual intercourse with her. He neither advanced the assertion that he reasonably believed the child to be an adult. He was accorded sufficient time and opportunity to cross-examine all the prosecution witnesses as well as tender a defence in a manner he thought was appropriate. A close examination of the proceedings indicates that the issue of the defence under Section 8(5) was introduced by the learned magistrate in his judgment. He introduced extraneous matters that were not part of the evidence before the court. That was a grave error and a misdirection on his part because at that point the Appellant did not have an opportunity to respond. On the part of the prosecution, they were able to discharge the burden in demonstrating that the Appellant for a long period was well known to PW1 as both came from the same village. His close proximity with her coupled with the fact that he even visited her at Kenyatta National Hospital when she was sick was sufficient evidence that he knew her to be a child. The circumstances therefore ruled him out in seeking refuge under Section 8(5) of the Sexual Offences Act. I have no doubt that PW1 candidly gave a graphic account of what transpired between her and the Appellant and that she spoke the truth.

On inconsistencies pointed out, it was the Appellant's submission that the prosecution failed to demonstrate the actual age of the foetus. According to PW3 who was a Clinical Officer at Karuri Health Centre, as at the time he examined PW1 on 26$^{th}$ September, 2012, the foetus was about 5 months old, which implied that taking into account that PW1 was born on 4$^{th}$ August, 1994, she was defiled when she was 17 years old. According to the Appellant, that evidence contrasted the report in the Obstetric Ultrasound examination which showed that the pregnancy was 21 weeks and one day old. This was roughly a period of five months and one week. I find no inconsistency in the dates as the two examinations are not incompatible but complementary. They both confirmed that the pregnancy was about five months old. This then drives me to make a determination on whether or not the elements of the offence of defilement were proved.

On penetration, the obvious is on record because PW3 in his examination found PW1 was pregnant, her hymen was also absent both being indicative that she had been defiled. Although a DNA test was done after the child was born I wish to concur with learned counsel for the Appellant that the manner in which the DNA samples were procured and presented to the Government Chemists was improper and the trial court ought not have relied on the examination results that the child born by PW1 was sired by the Appellant. Section 122A(1) and 122C(1) of the Penal Code gives guidelines on how DNA evidence should be procured. They read as follows;

> ***"122A(1)A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence to confirm or disprove that the suspect committed the alleged offence."***
>
> ***122C(1) Nothing in Section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made:***
>
> ***Provided that every such consent shall be recorded in writing signed by the person giving the consent".***

From the foregoing provisions, a DNA sampling can only be procured if a police officer from the rank of an inspector orders for it or a court gives an order that the sample be procured from a suspect or the suspect himself consents to the giving of the samples. In the present case, PW3 the Government Analyst testified that he was acting under the instructions of Police Corporal Hadija Kenga of Karuri Police Station. This means that the authority to extract the DNA sample came from a police officer below the rank of an inspector thus contravening Section 122A(1) of the Penal Code. There is also no evidence that any court gave an order for the sampling of the Appellant's DNA or that the Appellant consented to the sampling. It is therefore my humble view that the evidence adduced regarding the paternity of the child born was inadmissible. So then, the question for determination is whether there existed any other

evidence that sufficiently proved the guilt of the Appellant.

PW1 was well known to the Appellant who was her neighbor and who frequently visited her when she was at the hospital. She was also well acquainted with him as their homes were close to each other. In her evidence, she knew the Appellant by name, where he lived and to what extent they had both interacted. The question of mistaken identity would thus not arise. In view thereof, the Appellant was positively identified as the person who defiled PW1.

On PW1's age, a Birth Certificate produced in court showed that she was born on 4th August 1994. The evidence on record was that the Appellant started defiling her in April, 2012 when she was 17 years 8 months old. She was thus below the age of 18 years. Under Section 8(4) of the Sexual Offences Act, a person who commits an offence of defilement to a child between the age of 16 and 18 years is liable upon conviction to imprisonment for a term of not less than 15 years. As such, the prosecution proved all the ingredients of the offence of defilement. The Appellant's defence that the charges were trumped up against him was just but a sham and cannot bail him out. I find him guilty as charged.

In the upshot, I find that the prosecution proved its case beyond all doubts. This appeal lacks merit and the same is dismissed. I uphold both the conviction and sentence. It is so ordered.

**DATED** and **DELIVERED** this 24th day of **March, 2016**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

***1. The Appellant present in person.***

***2. M/s Aluda for the Respondent.***