REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 156 OF 2011

ABEDNEGO MACHARIA NJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in the Nyeri Chief Magistrates'

Court Criminal Case No. 45 of 2010 (Hon. Ogembo, D.O)

delivered on 15th July, 2011)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. It was alleged in the particulars of the offence that on the 19th day of December, 2010 in Nyeri district within central province, the appellant intentionally and unlawfully did an act by causing his penis to penetrate the vagina of C W N a girl aged 12 years.

The appellant initially pleaded guilty to the charge but later changed and entered a plea of not guilty; the case against him therefore proceeded to full trial at the end of which the learned magistrate held the state to have proved its case beyond reasonable doubt; he convicted the appellant as charged and sentenced him to 15 years imprisonment. It is this conviction and sentence that the appellant has appealed against. In in the petition of appeal which he filed in court on 25th day of July 2011, the appellant raised five grounds against the judgement of the lower court. However, in the submissions he filed in court on 2nd February 2015 he amended the grounds of appeal and reduced them to four. These grounds are as follows:

1. The learned magistrate erred in law and in fact in convicting the appellant based on the evidence of PW1 and PW3 which evidence was not credible and was doubtful;

2. the learned magistrate erred both in law and in fact by relying the evidence of the manner of arrest of the appellant to convict him;

3. The learned magistrate erred both in law and in fact in convicting the appellant on charges that were not proved and in particular, in the absence of the age of the complainant.

4. The learned magistrate erred both in law and in fact in rejecting the appellant's defence that was not challenged by the prosecution and thereby contravened section 212 of the Criminal Procedure

Code, cap 75 laws of Kenya.

As noted the appellant submitted on each of these grounds by way of written submissions.

The state opposed the appeal and its counsel argued that the appellant was properly convicted and sentenced. Mr Njue for the state argued that the prosecution case was proved beyond reasonable doubt and in this regard he asked the court to consider the evidence of PW1 and PW3. On the question of identification, counsel submitted that the appellant was not only known to the complainant but that he was also caught in the act of the sexual assault.

On the question of age of the complainant counsel for the state submitted that the complainant's mother testified that the complainant was 12 years old but conceded that there was no documentary proof of this fact. He urged the court to invoke section **358** of the **Criminal Procedure Code** and call for evidence on the age of the complainant at this appellate stage.

As far as the defence of the appellant is concerned, the learned counsel for the state urged that the learned magistrate considered the evidence of the appellant but found the same to be an afterthought. For these reasons counsel urged that the appeal should be dismissed.

Before coming to any conclusion, I have considered these rival submissions in the light of the evidence that was tendered at the trial. More importantly, however, this being the first appellate court, it is incumbent upon it to evaluate the evidence afresh and come to its own conclusions but always bearing in mind that the subordinate court had the advantage of seeing and hearing the witnesses.

The complainant testified that she was aged 12 and that she was in class seven at [particulars withheld] primary school. She told the court that on 19th of December 2010 at about 5 PM she was at home with her younger brother. Her mother, according to her evidence, had gone for prayers.

The appellant came to their home and send the complainant's younger brother to buy sweets. He then pulled the complainant from the kitchen and took her to her bedroom in the main house. He closed the door behind him and then placed the complainant on her bed. After removing her pants and his own trouser and inner wear he proceeded to insert his penis into the complainant's vagina. Because of the excruciating pain that she had been subjected to, the complainant screamed and members of public came to her assistance. They opened the door and found the appellant in the complainant's bedroom. They beat him up and took him to the police station together with complainant. The complainant was also taken to Nyeri provincial general hospital for treatment; she identified the P3 form with which she had been issued at the police station and was filled at the hospital. The complainant testified that she knew the appellant because he used to work for her grandmother whom she identified as H W and whose home was not away from their home.

The complainant's mother **G N N (PW2)** testified that on the material date at around 10 AM she went to church leaving behind the complainant and a boy called M who was aged six. According to her evidence, the complainant was 12 years old. At 5 PM she was told to rush home by one John Waithaka. When she reached there she found members of the public beating the appellant; they told her that they had responded to the complainant screams and found the appellant defiling her. She noticed that her daughter was wet in her private parts when she examined her. The appellant was escorted to the police station; she also took the complainant to the station but proceeded to Nyeri provincial general hospital. She said that she knew the appellant because he was an employee of her father who lived about one and a half kilometres away from her home.

Zeriba Wangu Kariuki (PW3) testified that she was on her way from a shop when she heard a girl screaming. She was screaming from her house near the road. Apparently, she recognised voice to be that of the complainant and therefore she stood outside their house and called her out. The compliant shouted back saying that the appellant was raping her. This witness also started screaming and in the process attracted many more people who came and opened the door. She then saw the appellant and the complainant come out of the bedroom. The complainant said that she had been raped by the appellant;

members of the public arrested the appellant and took him the police.

The doctor who examined the complainant was Dr Nyambura, medical officer at Nyeri provincial general hospital. She did not testify but the P3 form she filled upon examination of the complainant was produced by her colleague **Dr. James Waweru (PW4)** who said that he had worked with her for three years and that he was familiar with her handwriting and signature.

Dr Waweru testified that the complainant was examined on 22nd December, 2010 when she was escorted to hospital by her mother. It was established that she had been injured and the likely weapon that caused the injury was described as "blunt". The injury itself was assessed as "harm". The doctor confirmed and the hymen was broken and there was a whitish discharge. A high vaginal swab was done but no organisms were seen. In the doctor's opinion, there was sufficient evidence of sexual intercourse based on the fact that the hymen was broken.

The investigation officer was police constable **Esther Wangari (PW5).** She testified that the complainant's case was reported at the station on 19th December, 2010. She confirmed having recorded statements of the complainant and her mother. She also confirmed that the appellant had been beaten by members of the public and was also taken for treatment.

With this evidence, the learned magistrate held that it was sufficient put the appellant to his defence. The appellant in turn opted to give unsworn testimony according to which he stated that he worked as a shamba boy. He testified that on 19th of December, 2010, he had gone to the complainant's home where her mother had promised to give him his money. However, while he was there, the complainant's mother together with five other men confronted him and started beating him. Several other people joined them assaulted the appellant. He denied the charges against him and said that he had been framed simply because he demanded for his money.

Section 8 (1) and **(2)** of the **Sexual Offences Act** under which the appellant was charged provides as follows:-

8. Defilement

> *(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*
>
> *(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

I have held in previous judgments that two critical elements must be established before one is convicted of the offence of defilement under this section; first, the act of penetration and second, the age of the victim.

"Penetration" as a technical term is defined under **Section 2** of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

Dr James Waweru (4) testified that upon examination of the complainant, her hymen was found to be broken and in his opinion this was sufficient proof of sexual intercourse. He testified that the hymen could be broken by anything that could possibly go through the complainant's genitalia; however in this case, the course of the injury was a blunt object which he defined as anything that cannot cut sharply. On her part, the complainant testified that the appellant had forced his penis into her vagina. Her evidence was not shaken and there was no reason to doubt it. In my humble view, the evidence of the Dr Waweru corroborated the evidence of the complainant that she was sexually assaulted through penetration by the appellant's genital organs. The P3 form filled by Dr Nyambura and produced in court by Dr Waweru left no doubt that there must have been complete insertion of the genital organs of a person into the genital organs of the complainant as understood under **section 2** of the **Act**.

The other important question for consideration was whether the penetration amounted to defilement as defined under **section 8(1)** of the **Act** and whether the appellant was therefore culpable under subsection **8(2)** thereof.

From the evidence on record, there is no doubt that the appellant sexually assaulted the complainant; the complainant herself was quite candid on how the appellant came to her home, pulled her from the Kitchen and took her to the bedroom in the main house where he inserted his penis into her vagina. She cried out until members of the public, who included **Zeriba Wangu Kariuki (PW3),** came to rescue; they found the appellant in the complainant's bedroom. The complainant's mother (PW2) confirmed that when she arrived at her home she found members of the public beating the appellant. The appellant was no stranger to the complainant and her mother he was an employee of one of their relatives who lived nearby. I agree with the learned magistrate that there was sufficient proof beyond any shadow of doubt that it was the appellant who sexually assaulted the complainant.

The only other question which this court has to grapple with is whether the sexual assault amounted to defilement as defined under **section 8 (1)** of the **Sexual Offences Act**. According to this provision, defilement is not an offence as defined in law unless the act of penetration is with a *child.* As to who qualifies to be a child for purposes of the Act is not a question left to speculation; he is defined under **section 2** of the **Children Act, Cap 141** as *"any human being under the age of eighteen years"*. It follows that the age of a victim of a sexual assault is an important and a necessary component of the offence of defilement and to sustain a conviction for this offence, it must be proved, as a matter of law, beyond all reasonable doubt.

Again it has been my position that proof of age is not just important merely to prove whether there has been defilement or not; it is equally important in the meting out the punishment against an offender who has been convicted either under **subsections (2), (3) or (4)** of **section 8** of the **Act.** The severity of the punishment prescribed in these provisions is directly proportional to the age of the victim; under **subsection (2)** an offender convicted of defiling a child of 11 years or less faces a mandatory sentence of life imprisonment; according **to subsection (3)** the offender faces a minimum sentence of 20 years imprisonment while under **subsection (4)** where the victim is aged between 16 and 18, the offender is liable to imprisonment for a term not less than 15 years.

Subsection (2) under which the appellant ought to have been convicted was of particular interest in the sentencing of the appellant and thus it is necessary to reproduce this provision here:

> ***(2) A person who commits an offence of defilement with a child aged <u>eleven years or less</u> shall upon conviction be sentenced to imprisonment for life.. (Underlining mine).***

It is apparent an offence of defilement under **section 8(2)** can only be said to have been proved only if the age of the victim of the sexual assault has been established beyond all reasonable doubt; similarly, the court can only properly mete out the sentence against the offender if the age of the victim has been ascertained beyond peradventure. Suffice it to say that where an offence of defilement is alleged to have been committed, the age of a victim of a sexual assault is an essential ingredient in not only establishing that the offence has been committed but it is equally necessary in the sentencing of the offender.

The only evidence on record that the complainant was aged 12 (and not even 11 as suggested in the charge), at the time the offence was committed were the statements from the witness box by the complainant herself and her mother. Apart from the P3 where the estimated age of the complainant was given, there was no other documentary proof of this fact.

If age is an important component to establish an offence defined in section 8 of the Act, then its proof should not be taken for granted; it must be proved beyond all reasonable doubt. In the two Court of Appeal decisions that I have come across, and where this issue has arisen, the Court of Appeal has been of the view that the word of mouth alone is insufficient to prove age in a trial of an offence under **section 8** of the Act; proof of the fact of age demands some sort of documentary evidence. The Court, sitting at Kisumu in **Criminal Appeal No. 164 of 2009**, **Dennis Abuya versus Republic** held that an **"estimated**

age" indicated by a clinical officer in a P3 form cannot be held to be sufficient proof of one's age. The learned judges (R.S.C. Omolo, J.W. Onyango Otieno, J.G. Nyamu JJA, as they then were) said:

> ***There is a P3 form in the record before us and it shows that on 26th June, 2007, the appellant's "Estimated age" was eighteen years. By "estimated age" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at that date he was said to have committed the offence.***

In that appeal, the appellant had been convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act** and the issue that arose in the appeal was whether having been so convicted the appellant ought to have been committed to a borstal institution rather than imprisoned for life. For reasons given in the Court's judgment, an excerpt of which has been reproduced above, the learned judges allowed the appeal and remitted the case to the High Court with the direction that the Court calls for evidence establishing the appellant's age.

The point here is that the age indicated in a P3 form as "the estimated" age of either the victim or the culprit of a sexual offence is not a conclusive proof of that particular person's age; there is need for evidence ascertaining *conclusively* a person's age whenever the question of his or her age arises.

The importance of ascertainment of age in sexual offences was also alluded to by the same Court **in Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic.** At page 7 and 8 of its decision, the Court of Appeal had this to say:-

> **Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved 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 will be dependent on the age of the victim.**

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault the following terms:-

> **In its wisdom, Parliament chose to categorise the gravity of that offence 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 under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.**

The court concluded that ***"prove of age of a victim is a crucial factor in cases of defilement under the Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars***".

Considering the express provisions of the law supported by the forgoing decisions of the Court of Appeal, I am of the humble view that the prosecution did not prove, beyond all reasonable doubt, the age of the complainant. The trial court, on its part, proceeded on the presumption that the complainant was aged 12; this was a misdirection on the part of the court because it ought to have acted on proof rather than on presumptions.

And even if the court was satisfied that the complainant was aged 12, then it should have noted that the proper charge against the appellant ought to have been brought under section 8 (3) which caters for offences against minors of between 12 and 15 years. The appellant was instead charged under section 8(2) which covers the offence of defilement of a child who is 11 years or less. The penalty for this offence under this provision of the law is a mandatory sentence of life imprisonment. The trial court proceeded on the presumption that the complainant was aged 12 years and even then sentenced him to 15 years imprisonment instead of the minimum sentence of 20 years prescribed by the act.

The end result is that the appellant was convicted of an offence for which he was not charged and the sentence meted against him was, in any event, unlawful.

If the appellant had been properly charged and the only question was the ascertainment of the age of the complainant, I would have had no difficulties in invoking the provisions of **section 358** of the **Criminal Procedure Code** and remitted this file back to the subordinate court to take evidence on the age of the complainant for purposes of meting out an appropriate sentence against the appellant. However, it has turned out that age is not the only issue; there is a further, equally important issue, that the offence with which the appellant was charged under section 8(2) of the Act related to a complainant who is 11 years or less yet particulars of the offence and the evidence which the prosecution led, however insufficient it has been found to be, was for an offence prescribed in **section 8 (3)** of the **Act.** The charge was clearly at variance with the particulars of the offence and the evidence that was led at trial. I think this error was fatal to the prosecution case; the mistake would not have been avoided if either the prosecution or the trial court had taken steps at the appropriate time to amend the charge sheet and charged the appellant with the proper charge consistent with the particulars of the offence and the evidence that was proferred.

As things stand out now, if one was to take the prosecution at its word that the complainant was aged 12 at the time the offence was committed, the inevitable conclusion is that the charge of defilement under **section 8(2)** of the Act was not proved. The mistake by the prosecution in framing the charge sheet and the omission by the trial court to note the mistake and take the initiative to correct it are errors which cannot be corrected at this stage. The conviction cannot be sustained and the only option open to this court is to quash it and set the sentence aside. The appeal is thus allowed and the appellant is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court on this 13th day of October 2016.

Ngaah Jairus

JUDGE