



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO.103 OF 2013**

**M K M..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*( From the original conviction and sentence in criminal case No. 720 of 2012 of the Chief Magistrate's Court at Isiolo by Hon. R.G Mundia – Resident Magistrate)*

**JUDGMENT**

The appellant, **M K M**, was convicted in two counts where he was charged with the offences of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 5<sup>th</sup> June 2012 at [Particulars withheld], Isiolo County, intentionally and unlawfully caused his penis to penetrate the vagina Of **M N**, a child aged 10 years. On the same day and place he intentionally and unlawfully caused his penis to penetrate the vagina of **S L**, a child aged 8 years

The appellant was found guilty of the offences and sentenced to serve 10 years imprisonment in count one, 15 years imprisonment in count two. He was ordered to be committed to Shimo la Tewa borstal institution until he attained the age of 18 years. at the time he was 15 years of age. He now appeals against the conviction and the sentence.

The appellant was represented by Mr. Omari, learned counsel who raised 11 grounds of appeal which can be summarized as follows:

1. that the learned trial magistrate erred in law and fact by not making a finding that the evidence and the particulars of the offence were at variance.
2. that the learned trial magistrate erred in law and fact by failing to find that the medical evidence and that of the complainants was at variance.

Initially the state through Mr. Odhiambo, learned counsel had opposed the appeal but on a second thought he decided to concede.

At the trial court the facts of the prosecution case were briefly as follows:

When the appellant met with the two complainants, he coerced them to follow him into a disused house where he sodomised each one of them.

In his defence the appellant denied to have committed the offence.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32**.

Before I address the issues raised, I wish to observe that

the charges in both counts were wrongly drafted. They ought to have read:

**"... contrary to section 8 (1) as read with section 8 (2) ..."**

I however find that the appellant was not prejudiced for he understood the charges against him. The defect is therefore curable under section 382 of the Criminal Procedure Code.

Section 134 of the Criminal Procedure Code provides as follows:

**Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.**

When the prosecution is adducing evidence, the intention is to prove that the offence was committed in the manner the particulars have been set out. Not every variance between the evidence and the particulars must be fatal to the prosecution case but where there is a major departure from the particulars, this will entitle an accused person to an acquittal. Particulars of the offence are meant to give notice to an accused person as to the nature of evidence expected to be adduced against him/ her.

In the instant case the particulars were that the appellant defiled the two minors as per vagina. The minors' evidence however, is that they were defiled per anus. Why did the prosecution fail to apply to amend the particulars of the offences after the testimony of these two minors was at variance with the particulars of the offences? In my view the appellant was prejudiced for the trial to proceed to the conclusion.

The medical evidence adduced by Karayu Jillo (PW8) complicated the prosecution case further. He did not examine the anal orifices of the complainants. However his examination on their genitalia indicated that though their hymen was intact, they had some lacerations on the genitalia which made him to conclude that there was penetration. First, his evidence contradicted that of the minors as to what happened to them. According to the two minors, they were sodomised. Secondly and very important, a laceration on the female genitalia is not an indicator of penetration. At most it may be evidence of an attempt to. The contradiction in the medical evidence and that of the two complainants brought forth a credibility issue. The court of appeal in the case of **NDUNGU KIMANYI -V- REPUBLIC [1979] KLR 283**, (MADAN, MILLER and POTTER JJA) held:

**"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."**

In the instant case the credibility of the two minors was seriously eroded and it was unsafe to found a conviction on their evidence.

The learned trial magistrate erred in convicting the appellant and sentencing him. Section 189 of the Children Act Cap 141 provides as follows:

**The words “conviction” and “sentence” shall not be used in relation to a child dealt with by the Children’s Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.**

Section 191(1) of the Act provides several methods of dealing with minor offenders. One such a method is to be committed to a borstal institution under paragraph (g) which states as follows:

**In the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;**

The import of this paragraph is that the appellant who was aged 15 years at the time was illegally committed to a borstal institution.

The upshot of the foregoing analysis of the evidence on record is that the appeal must succeed. The conviction is quashed and the sentence set aside. He is set at liberty unless if otherwise lawfully held.

**DATED at Meru this 20<sup>th</sup> day of December, 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**