**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 40 OF 2015**

**D W M..... APPELLANT**

**VERSUS**

**REPUBLIC .....STATE**

***(Appeal from the Sentence of the Chief Magistrate's Court at Molo Hon. H. M Nyaga –Chief Magistrate delivered on the 4th February 2015 in CMCR Case No.2365 of 2010)***

**JUDGEMENT**

The appellant **D W M** has filed this appeal challenging his conviction and sentence by the learned Chief Magistrate sitting at the Molo Law Courts.

The appellant had been arraigned before the trial court on 29/9/2010 facing a charge of **DEFILEMENT CONTRARY TO SECTION 8(1) (2) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the charge were that

> ***"On unknown day during the month of September, 2010 at Molo District of the Rift Valley Province, intentionally and unlawfully caused the penetration with his penis into the genital organ namely vagina of H M a girl aged 4 years in violation of the said Act".***

The appellant also faced an alternative charge of **INDECENT ACT WITH A CHILD contrary to Section 11(1) OF THE SEXUAL OFFENCES ACT**. He faced Count No 2 of **DELIBERATE TRANSMISSION OF A SEXUALLY TRANSMITTED DISEASE**. The appellant entered a plea of **'Not Guilty'** to all the charges. His trial commenced on 11/5/2011 at which trial the prosecution led by **CHIEF INSPECTOR MUTETI** called a total of six (6) witnesses in support of their case.

The complainant **'H M'** was a young girl said to be aged 4 years. She was unable to testify before the court either due to fear or shyness and thus no evidence was adduced from her.

**PW1 M M** was the complainant's mother. She testified that she knew the appellant very well since they cohabited as man and wife in Molo. **PW1** stated that she lived with the appellant together with her two daughters from a previous relationship. Although the appellant was not the biological father of the complainant the child referred to him as **'Daddy'.**

**PW5 P N** was a niece to **PW1** who was previously living with the family. **PW5** told the court that on the material day she noticed that the complainant child would grimace in pain whilst urinating. She questioned the child in an attempt to find out what was wrong. The child initially hesitated but later

revealed to **PW5** that her **'Daddy'** (appellant) had done bad things to her. **PW5** alerted the child's mother. **PW1** examined her child's private parts and noticed injuries thereon. She reported the matter to police. The child was taken to Molo Hospital for medical examination. The appellant was later 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 opted to make an unsworn statement in which he denied having defiled the child.

On 4/2/2015 the learned trial magistrate delivered his judgment. He convicted the appellant on the main charge of Defilement and also convicted him on Count No. 2 for Deliberate Transmission of Sexually Transmitted disease. After listening to the appellant's mitigation the trial magistrate sentenced him to serve life imprisonment on the 1st Count and ten (10) years imprisonment on the 2nd Count. The sentences were to be served concurrently.

Being aggrieved the appellant filed this appeal. The appellant who was not represented during the hearing of his appeal chose to rely entirely upon his written submissions which had duly been filed in court. **MS OUNDO** learned Senior Assistant Director of Public Prosecution made oral submissions in which she opposed the appeal.

This being a first appeal the High Court is obliged to review the prosecution evidence afresh and draw its own conclusions on the same. In the case of **MWANGI Vs REPUBLIC [2004] 2 KLR 28** the Court of Appeal held that

> ***"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.***
>
> ***2. The first appellant court must itself weigh the conflicting evidence and draw its own conclusions***
>
> ***3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses"***

In his submissions the appellant alleged that the trial magistrate failed to comply with Section 200 of the Criminal Procedure Code.

A look at the record reveals that this trial commenced on 11th May, 2011 before **HON. SOITA** Principal Magistrate who heard the evidence of the first two witnesses.

On 8/6/2012 **HON. H. M. NYAGA** Senior Principal Magistrate took over the hearing of the case. The record clearly indicates that Section 200 was explained to the accused who in exercise of his right demanded that **PW1** be recalled for further questioning. The trial magistrate allowed this request and directed that **PW1** be recalled to testify. Thus it is erroneous for the appellant to state that Section 200(3) was not complied with. The record shows that it was complied with and the appellant was allowed to indicate which witness he wished to have recalled.

As it turned our **PW1** did not come back to the stand. This was not due to a failure to comply with Section 200. Several adjournments were granted to allow the prosecution time to trace this witness. I have no doubt that all efforts were made to find her. Finally on 22/5/2014 the Investigating Officer told the court that **PW1** had remarried and moved to Ukambani. All efforts made to have her even using her mobile number failed. The trial magistrate made a ruling on 27/8/2014 that the testimony of **PW1** before his predecessor would be relied upon.

I find that given the circumstances the court made the correct decision. It had been over three (3) years and all efforts to trace **PW1** had failed. As indicated by the Investigating Officer this witness had moved to another part of the country and had created a new life for herself and her children. Failure to trace this witness was not due to any lack of effort on the part of the prosecution. In as much as the appellant had a right to have the witness recalled, the court had bent over backwards to ensure that this happened. However where it has proved impossible to trace the witness then the court has no option but to rely upon the evidence on record.

I note the when **PW1** testified on 11/5/2011 the appellant was allowed an opportunity to cross-examine her and indeed he proceeded to do so robustly. The fact that this witness was not recalled did not in my view render the entire trial a nullity. I therefore dismiss the ground of the appeal.

Returning to the evidence the appellant faced a charge of Defilement. In order to prove this charge the prosecution was required to adduce evidence to show firstly that the child was in fact defiled as is alleged and secondly evidence to prove that it was the appellant who perpetrated the offence and thirdly evidence to prove the age of the child.

As stated earlier the complainant child was presented to court but was unable to testify on her own behalf. The record at Page 8 Line 6 shows that the prosecutor stated

> ***"I am not able to get anything from the complainant"***

The trial magistrate also stated as follows

> ***"I have also tried to talk to the complainant and she cannot even respond to the greetings. We shall proceed with the other witnesses"***

The complainant who was said to be a 4 year old child declined to talk at all either to the prosecutor or to the trial magistrate. Given her age this was not surprising as young children are often intimidated in a court setting and fear to speak out. It appears that after this first attempt no further effort was made by the prosecution or the court to get the child's evidence. Section 31 of the Sexual Offences Act allows a victim to give evidence through an intermediary *ie* a parent, a social worker, medical officer, religious leader, therapist etc. None of these options were explored.

Be that as it may **PW3** the child's cousin did testify. She stated that she noticed that the child had difficulty (pain) whilst urinating and questioned her. The child revealed to **PW3** that she had been defiled. **PW3** reported this to **PW1** the child's mother who examined her private parts. She noticed injuries on the child's genitalia. The complainant was then taken for medical examination.

**PW3 RUTH SANDE** a clinical officer attached to Molo Hospital said that the child was examined at that facility. She produced the P3 form **P. Exb 1** and treatment card **P. Exb 2**. The examination revealed a torn hymen with a whitish discharge from the vagina. Further testing revealed the existence of urine in the pus cells. The conclusion of the doctor was that the child had been defiled.

Based on the testimony of **PW3**, **PW1** and the doctor, based on the torn hymen on a child so young, I am satisfied that the fact of defilement has been sufficiently proved and I so find.

The next question is that of the identity of the perpetrator. **PW3** stated that the child informed her that her **'dad'** (appellant) did **'bad things'** to her. Given that the child was unable to testify and did not even able to point at the appellant it is difficult to accept this as proof of identity. **PW3** herself appeared to harbour a grudge against the appellant. She stated that the appellant had made sexual advances to her when she lived with the family and she appeared to be angry or upset towards him because of this. Her evidence could have been tainted due to this.

**PW1** the child's mother stated that the appellant had the **'opportunity'** to defile the child. The existence of opportunity is not proof of the commission of an offence. No witness saw appellant alone with the

child. Nobody saw appellant sneak back to the house whilst the mother was away. Thus this testimony amounts to nothing more than speculation.

In his judgment the learned trial magistrate found that the presence of infection in both the appellant and the child pointed to the appellant as the perpetrator. **PW3** the doctor who examined the child stated that the existence of pus cells in the child's vagina was proof of an infection. **PW3** did not however state the type of infection and whether it was sexually transmitted or not.

**PW2 MACHARIA MWANGI** A clinical office examined the appellant. He found him to have a **'fungus infection in the urine'.**

In her judgment at Page 62 line the trial magistrate stated

**"The clinical officer found that the accuseds laboratory tests revealed pus cells, the same cells seen in the complainant"** and went on to opine thus

> ***"In my opinion the medical evidence creates a link between the accused and complainant. Both have a similar type of infection as shown by the pus cells...."***

With respect I find that the trial magistrate erred in this reasoning and conclusion. Firstly the evidence only shows that both the appellant and the child had an infection. No evidence was called to show that they had the **same** type of infection. Only a lab technologist or technician could have certified this with any degree of certainty. It is not out of the realm of possibility that the complainant being a child who often plays out in the open and may not be very careful in her personal hygiene could easily pick up an infection from another quarter. The link between the two could only be made if there was concrete and scientific evidence to prove that both had the same sexually transmitted infection. As it is the evidence fell short of proving this as a fact and thus I find this to be tenuous at best.

All the court has by way of evidence on identification is the word of **PW3** who as I have found may have had her own motives for implicating the accused. There is evidence that as a step-father living with the child indeed had the opportunity to defile her. That may well be so but proof of opportunity does not amount to proof of commission of the offence. Finally the finding by the trial court that the presence of the same infection in both the appellate and the child is proof that he committed the offence is in my view erroneous. I therefore find that there remains a real doubt as to whether it was the appellant who defiled the child. The benefit of such doubt must be awarded to the appellant.

The final element requiring proof is the age of the child. In the charge sheet her age was given as 4 years. No document was produced to prove her age. **PW1** the child's mother made no mention of the child's age in her testimony nor did she indicate the date or year when the child was born. The trial magistrate himself made no mention of his own assessment of the age of the child based on observation.

The age of the victim in defilement cases is a fact in issue, one which requires proof as it will affect the nature of punishment if the accused is convicted. In this case no proof of the child's age either by way of document or through her mother's testimony was given to the court. The trial magistrate totally failed to address this question of age in his judgment which in my view was a serious omission.

Based therefore on the foregoing, I find that the charge of Defilement was not proved beyond reasonable doubt. The prosecution failed to tie up several important aspects of the evidence. I find that the appellant's conviction on both Counts 1 and 2 were not sound and I hereby quash those convictions. The sentences imposed upon the appellant are also set aside. This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated in Nakuru this 9th day of December, 2016.**

**Maureen A. Odero**

**Judge**