No. 498/15

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 71 OF 2013

J M M …….……APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in Kangundo Principal Magistrate's Court Sexual Offences Case No. 7 of 2012

by Hon. Japhet Bii , RM on 19/2/13)

J U D G M E N T

1. **JMM,** the Appellant, was charged with the offence of **defilement** contrary to **Section 8(1) (2)** of the **Sexual Offences Act, 2006**. Particulars thereof being that on the 9th day of April, 2012 in **Matungulu District** of the **Machakos** County, intentionally caused his penis to penetrate the vagina and anus of **ENM** a child aged 9 years.
2. In the alternative, he was charged with commiting **indecent Act** on a child contrary to **Section 11(1**) of the **Sexual Offences Act No.** 3 of 2006. Particulars thereof being that on the 9th day of April, 2012 in **Matungulu** District of the **Machakos** County intentionally touched the anus and vagina of a child aged 9 years with his penis.
3. Facts of the case were that on the 9th day of April, 2012, **PW1, EN,** the complainant was asleep inside the house with her three siblings when the appellant who previously cohabited with her mother knocked at the door. They opened for him. They lit the lamp. The appellant told **K** her sister to go to bed. Then he took the complainant to her mother's bed whereby he had carnal knowledge of her. He left in the morning. **PW2, AMK,** her mother who was away left **K** going home in the morning of 9/4/2012. She found her daughter limping and she disclosed what had befallen her. She took her to hospital.
4. **PW3, Dominic Mbindyo,** a Clinical Officer on examining her found she was limping. She had a bruise on the right side of the back. Her hymen was torn with fresh blood stains. He concluded that there was penile penetration of the vagina. **PW4 No.62590 Corporal Ruth Mutuku** re-arrested the appellant after he surrendered to the police.
5. In his defence the appellant stated that he went to the Police Post after he was called and they sought to know if he knew PW2. Denying having committed the offence he said that on the material date he was fetching sand at the river.
6. The trial court evaluated evidence adduced and found the appellant guilty. He was convicted and sentenced to life imprisonment
7. Being aggrieved by the conviction and sentence, he appealed on grounds that:-

i. The charge was defective and at variance with evidence adduced;
ii. Medical evidence was adduced by a Clinical Officer, not a Medical Officer hence unsatisfactory ;
iii. **Section 169(1)** of the **Criminal Procedure Code** was not adhered to;
iv. The case was not proved beyond reasonable doubt.

8. At the hearing of the appeal the appellant relied upon written submissions and added orally that he was not arrested by the police. He went to the Police Station himself on learning of the allegations.
9. **Mrs Saoli,** learned State Counsel opposed the appeal. She stated that the burden of proof was discharged by the prosecution; the appellant having cohabited with the complainant's mother was well known to her, therefore she recognized him; the act of defilement was confirmed; her age was established as 9 years. In response thereto the appellant denied having cohabited with the complainant's mother whom he dismissed as a drunkard.
10. This being the 1st appellate court my duty is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial cour*t.* ***(See Okeno versus Republic (1972) E.A. 32).***
11. The charge is alleged to have been defective and at variance with evidence adduced. The objective of a charge is solely to inform the accused person the matter he is being accused of having done. Once the necessary ingredients of a charge are disclosed to the accused to enable him respond appropriately the charge cannot be defective.
12. Regarding evidence adduced the age of the child was proved by a Birth Certificate and evidence adduced by PW2 her mother. It has been held interalia that in defilement cases, medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may be proved by a birth certificate, the victim's parents or guardian and by observation and common sense. (see ***Uganda versus Magidu Othieno High Court Criminal Case No. 97 of 2010; Francis Omuroni* versus Uganda,** Court of Appeal ***Criminal Appeal No. 2 of 2000; Sekai Versus the State 1985 BLE 34(HC)-*** the age of the complainant was proved beyond any reasonable doubt.
13. Medical evidence was adduced by a Clinical Officer. This has been faulted as a Clinical Officer is not a Medical Officer. It has been held severally that a Clinical Officer is qualified to fill P3 forms as this is his area of competence. (see **Fappyton Mutuku Ngui *versus Republic [2014] eKLR; Raphael Kavoi Kiilu versus Republic Criminal Appeal no. 198 of 2008; Section 2*** of the ***Clinical Officers Act (Training , Registration and licencing Act Cap 260 (LOK).***
14. Medical evidence adduced proved the fact that on the night of the 9th April, 2012 the complainant sustained tears of the labia majora, labia minora and the hymen was torn and there was a presence of fresh blood stains. The Clinical Officer formed an opinion that there had been penile penetration of the vagina.
15. It was the evidence of the complainant that the person who sexually violated her innocence was the appellant. The incident happened at night. The appellant previously cohabited with PW2, the complainant's mother. On cross-examination. PW1 stated that :-

> "***I know you as my dad… I have seen you severally after you parted with mum."***

16. The complainant opened the door for the appellant per her evidence after they lit the lamp. It was a case of recognition Courts have held that:-

> "***Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant" (see Wamalwa & Another versus Republic [1999] 2 E.A 358)(CA); Anjononi & Others versus Republic [1980] KLR 59".***

17. The appellant was well known to the complainant having lived in the same house previously. A child of her age could not be mistaken as to his identity. In his defence the appellant narrated how he was arrested. He proceeded to critically evaluate evidence adduced by witnesses called by the prosecution. He concluded his testimony by stating that on the fateful night he was at the river

where he had gone to collect sand and the motor-vehicle had developed mechanical problems. This defence was considered by the trial court and found to have been mere allegation that was not a sufficient explanation as to what happened. In the premises evidence adduced by the complainant was not challenged at all.

18. The learned trial magistrate had the opportunity to observe the complainant's demeneour and had this to state in her regard.

> ***"I have absolutely no reason to question the evidence of PW1 (the complainant) I am convinced she told the truth"***

19. Having complied with the proviso to Section 124 of the Evidence Act Evidence adduced by the complainant as to who defiled her was sufficient to prove the charge. In the premises the charge was proved to the required standard.

20. **Section 169(1)** of the **Criminal Procedure Code** provides:-

> "***Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it".***

21. It is a requirement that points of determination be stated in a judgment. It has been stated that writing of judgments is an art peculiar to each individual judicial officer. The court in the case of ***John Omondi Okoth & Another versus Republic Criminal Appeal 118 & 127*** of **2008** having found itself in such a situation interrogated whether failure to adhere to the mandatory provision of law makes the trial a nullity. The court in emphasizing the fact that such provisions of the law should not disregard declined to reach a finding that the trial was a nullity.
22. In the instant case the trial magistrate did not come up with points for determination but he evaluated evidence based on issues that arose in the matter. Consequently this being a procedural requirement it cannot be upheld to defeat substantive law. Procedural laws are designed to subserve ends of justice but not to frustrate justice. In the premises, that ground of appeal fails.
23. The mandatory sentence provided for the offence is life imprisonment
24. In the result, I find the appeal lacking merit it is dismissed in its entirety.
25. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **22ND** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE