REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 120 OF 2012

G J M ……………..................................……………..….APPELLANT

VERSUS

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

Being an appeal from the original sentence and conviction in Makindu Principal Magistrate's Court Criminal Case No. 220 of 2012 by Hon. P. Wambugu , RM on 27/8/12)

JUDGMENT

1. **G J M,** the Appellant was charged with the offence of **defilement** of a girl contrary to **Section 8(1)** and **(2)** of the **Sexual Offences Act No. 3** of **2006.** Particulars are that on the 26th day of February, 2012 at about 1.00pm at **[Particulars Withheld] Camp** in **Kibwezi District** within the **Eastern Province** intentionally and unlawfully caused his male organ namely penis to penetrate the female organ namely vagina of **M M** a child aged 4 years .
2. In the alternative he faced a charge of committing an **indecent** act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars are that on the 26th day of February, 2012 at about 1.00pm at **[Particulars Withheld] Camp** in **Kibwezi District** within the **Eastern Province** willfully and unlawfully touched the genital organ namely vagina of **M M** a child aged 4 years.
3. Facts of the case as presented by the prosecution were that **PW1; M M** was called by the appellant, their neighbour who lied to her that there were children inside his house. Believing that the allegation was true she entered the house. The appellant removed her pants and had carnal knowledge of her. These were events of the 26th February, 2012 according to the charge sheet.
4. On the 3rd of March, 2012 at about 8.00 a.m **PW2, A N,** the complainant's mother was changing her clothes when she sniffed something foul. She asked the complainant what happened to her and she claimed that she had been injured by a stick. She threatened to beat her, that is when she revealed that **G** had done something bad to her on a Sunday. She took her to hospital for treatment.
5. **PW4 Dr. Hannington Mibei** examined her. On the genitalia the labia majora was swollen, she had difficulty in walking. Further investigations carried out revealed her urine had pus cells which was a sign of infection, possibly gonorrhea a sexual transmitted disease. The appellant was also examined and treated for a similar infection. He was arrested and charged.
6. When put on his defence the appellant testified that on the material date he woke up as usual and did daily chores until lunchtime. In the afternoon he went to watch soccer. He returned home at 8.00pm, had dinner and slept. On the 4/3/2012 he was arrested by an officer who accused him of having an affair with his wife. They even fought. Stating that previously he had a case with the

complainant's family he accused the Doctor for having lied.

7. The learned trial magistrate evaluated evidence presented and found it credible. He found the appellant guilty, convicted him of the main count and sentenced him to thirty (30) years imprisonment.
8. Being aggrieved by the conviction and sentence the appellant appealed on grounds that the learned magistrate erred in law and fact:-

i. By basing the conviction on fabricated evidence adduced by PW2 and PW3 without considering that a grudge existed between the appellant and PW2;
ii. Crucial witnesses were was not called to testify;
iii. The charge was defective ;
iv. No medical evidence was adduced to prove penetration having occurred beyond any reasonable doubt;
v. The defence was disregarded.

9. The appellant canvassed the appeal by way of written submissions. The State through **Mrs Abuga,** State Counsel, opposed the appeal arguing that although the appellant threatened the complainant she later revealed what he had done. She also contracted the sexually transmitted infection that the appellant had. She urged the court to enhance the sentence to life imprisonment.
10. This being the first appellate court, it is my duty to subject the evidence tendered in the lower court to fresh and exhaustive evaluation to reach my own conclusion bearing in mind the fact that I did not see or hear witnesses. *(See **Okeno -versus- Republic [1972] E.A. 32).***
11. The trial magistrate has been faulted for not considering that crucial witnesses were not called to testify. In the case of ***Mwangi -versus- Republic [1984] KLR 595*** the Court of Appeal held thus:-

> "***Whether a witness should be called by the prosecutor is a matter within the discretion of the prosecutor and the court will not interfere with the discretion unless it may be shown that the prosecution was influenced by some oblique motive".***

12. It is argued in particular that the prosecutor did not call the doctor who treated the complainant at the outset at **Mitito Andei** and **Voi District** Hospitals. Evidence adduced was of a P3 (medical examination report) filled by **Dr. Mibei H.K** who was PW4. The document was therefore primary evidence. When filling the P3 form he was aided by the treatment notes issued to both the complainant and appellant at **Mtito Andei Health Centre.** He personally examined the victim and suspect and confirmed what was on the treatment card. Calling the person who first saw them was not a requirement in law. In the premises the prosecution exercised its discretion of calling witnesses wisely without abusing any process. Evidence adduced did not suffer from any frailties, it was therefore credible.
13. It has been stated that the charge is defective. **Section 134** of the **Criminal Procedure Code** provides for framing of charges. It states thus:-

> ***"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".***

14. The charge as framed discloses the statement of offence. The particulars of the offence provided disclose ingredients of the offence of defilement. The age of the child is also stated. The information given therefore did disclose the nature of the offence to the appellant which enabled him to participate in the trial and defend himself. Appropriately. Therefore the charge was not defective.
15. Medical evidence adduced established the fact that the complainant's labia majora was swollen. On cross–examination the Doctor (PW4) stated that the swelling of the labia was a sign of penetration. This was proof beyond doubt that there was penetration.
16. This brings us to the first ground of appeal – whether the conviction was based on fabricated evidence. It has been alleged that a grudge existed between the appellant and PW2 and PW3,

Rukia Kassim. In his defence the appellant stated that on the 4/3/2012 an officer went to his house and accused him of sleeping with his wife. A fight ensured between them and he was arrested. He alluded to a case he had with the witnesses (PW2 & PW3) whereafter they vowed to have him incarcerated.

17. In her evidence PW2 stated that the appellant is well known to her as he is her brother. This fact was not challenged. It was admitted by PW2 and PW3 that there was a case where it was alleged that the appellant was sleeping with all women at **[Particulars Withheld] Camp.** The issue was however raised with his (appellant's) father and it was resolved.
18. Looking at the instant case there was proof that the complainant was sexually violated. There was penetration of her genital organ (vagina) which was proof of the fact of defilement beyond any reasonable doubt. When it happened per the evidence adduced, she was afraid; she did not inform her mother. Her evidence therefore required corroboration.
19. In the case of ***Mohamed versus Republic [2008]1 KLR [G & F] 1176*** the court of Appeal stated:-

> ***"… the Court of Appeal has reiterated that an importance element in the definition of corroboration is that it affects the accused by connecting him or tendering to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it".***

20. Both the complainant and the appellant on being subjected to medical examination, the complainant was found to have a sexually transmitted disease that was compatible with the one the appellant had. The appellant claimed that he was framed-up but did not deny the fact that he had an infection similar to the one the complainant had. The only inference that could be drawn which was correctly drawn by the trial court was that it was the appellant who defiled the complainant. That evidence corroborated the evidence of the complainant that the appellant defiled her. Therefore the conviction was merited. Accordingly I confirm it.
21. With regard to the sentence meted out, **Section 8(2)** of the **Sexual Offences Act** Provides:-

> "***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".***

22. Being a first appellate court, I have the mandate to alter a sentence imposed by the Lower Court. In the case or ***Griffin –versus- Republic [1081] KLR 121,*** the Court of Appeal held that an appellate court will interfere with sentence where it is established that the sentence was illegal.
23. The provision of ***Section 8(2)*** of the ***Sexual Offences Act*** is couched in mandatory terms. The sentence of 30 years imprisonment was therefore illegal. Pursuant to the provisions of **Section 354(3) (a) (iii)** of the **Criminal Procedure Code.** I am called upon to alter the sentence by increasing it. I therefore set aside the sentence imposed and substitute it with one of life imprisonment.
24. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17TH** day of **MARCH, 2015.**

L.N. MUTENDE

JUDGE