



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 447 OF 2010**

A W M ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**(From original Conviction and Sentence in Criminal Case No. 2844 of 2009 of the Chief Magistrate's Court at Mombasa – Hon. Mwangi - SRM)**

**JUDGMENT**

A W M hereinafter referred to as the Appellant was convicted and sentenced to twenty (20) years imprisonment for the offence of defilement of a boy contrary to section 8(1) (2) of the Sexual offences Act No. 3 of 2006.

The particulars were that:-

***“On the 17th day of August, 2009 at about 10:00 pm at [particulars withheld] Village Likoni – Mombasa County, he unlawfully and intentionally caused his penis to penetrate the anus of M D a boy aged nine (9) years”.***

In support of their case, the prosecution called eight (8) Witnesses whereas the defence called one(1).

Being dissatisfied by the decision of the learned trial magistrate, the appellant has filed this appeal.

The first ground is that the charge was defective for failure to include the words ***“as read with”***.

Secondly, that there were major contradictions in the evidence presented by the prosecution Witnesses.

Thirdly, that the trial magistrate placed the burden of proof on the Accused instead of the prosecution and hence arrived at an erroneous conclusion.

Fourthly, that the admission in evidence of a birth certificate was unprocedural.

Fifthly, the provisions of section 38 of the Sexual offences Act were not complied with.

Lastly, the defence preferred by the Accused was not considered by the Court.

A perusal of the charge does show that indeed there was the omission of the words **“as read with”** but the section is clearly shown as section 8(1) (2) of the Sexual offences Act No. 3 of 2006. That omission, I find did not prejudice the appellants case. He fully participated in the proceedings and cross-examined the Witnesses. He clearly, understood the charges facing him.

### **Voire dire Examination.**

The learned trial magistrate did carry out a Voire dire examination of the child which was in the form of question and answer and did come to the conclusion that the child was intelligent enough to give unsworn evidence.

This child (PW 4) did testify of how the Accused who is his uncle had visited their house and how they had escorted him to his house in the company of his father and of how he was left there to sleep to be picked by his father the following day. At page 14 line 7 of the proceedings he had this to say,

***“Then the Accused held his penis and turned me lying on the stomach and he put his penis into my anus and told me not to cry. I started crying and uncle said I should not cry. He did that act six times and then we slept”.***

Doctor Ngone (PW 3) who examined the Complainant found bruises on the anal opening and he formed the opinion that there was penetration by a blunt object.

The Complainants father PW 1 did tell the Court of how he escorted the Accused who is his cousin to his house while in the company of the Complainant and left his son to sleep there overnight only to be informed by his wife the following day that their son had been sodomized by the Accused. The Complainants mother PW 5, did testify of how her husband and son escorted the Accused to his house and how her husband returned alone leaving behind their son to sleep there overnight as they were relatives. The following day when she went to collect her son. She observed that he had a suspicious walking gait and did not appear his normal playful self. She prepared a bath for him and upon examination she was met by a foul smell upon removing his clothes. The anal region and the buttocks appeared tender. The child told her that it was the Accused who had sodomized him the previous night. She informed her husband and they took the child to Hospital and reported the matter to police and the Accused was arrested. She gave the age of the Complainant as ten (10) years and a certificate of birth was produced showing that the Complainant was born on 28th September, 2000.

The production of this exhibit was by the investigating officer. It was properly produced in Court. Upon evaluating the evidence on record I am satisfied that proper Voire dire examination of the child was done by the learned trial magistrate.

The Accused had penetrated the Complainants anus with his male sexual organ namely penis. This was corroborated by the evidence of the Doctor who found that there was penetration of the anal region by a blunt object.

At the time of the incident the Complainant was aged nine (9) years.

The Accused was the Complainants uncle. The Complainant was left under his care overnight by his father but he breached the trust bestowed upon him by his cousin. In his defence he did put up an alibi defence to the effect that he was on duty at the time of the alleged offence. During cross-examination of the Witnesses he did not allude to having been on night shift on the material day. This was an afterthought and the learned trial magistrate rightfully found so. The evidence against the appellant was overwhelming and the conviction was safe. He was sentenced to twenty (20) years imprisonment. The offence carries a maximum sentence of life imprisonment. That Sentence cannot be said to be harsh or unreasonable.

This appeal has no merit. It is dismissed. The Conviction and Sentence is upheld.

Judgment delivered dated and signed this **10th** day of **April, 2015**.

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**M. MUYA**

**JUDGE**

**10TH APRIL, 2015**

***In the presence of:-***

Learned State Prosecutor Masila

The appellant present

Court clerk Musundi