REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 204 OF 2009

JAMES MURIMI GICHORIA…….....……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a child contrary to **section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the offence are stated thus:-

> **"JAMES MURIMI GICHORA:- Between 8th-10th day of November, 2008 at Gatura Village in Nyeri District within central province committed an act which causes penetration with a child namely GNM aged 13 yrs."**

In the alternative to this principal count, the appellant was charged with the offence of compelled indecent act contrary to **section 6 (a)** of the **Sexual Offences Act** the particulars being that between the 8th and 10th days of November, 2008 in Nyeri District within central province, the appellant intentionally and unlawfully compelled a child namely GNM to an indecent act by touching her private parts.

The appellant was convicted on the principal count of defilement and sentenced to 20 years in prison; he has appealed to this court against both the conviction and sentence on the following grounds:-

1. The learned magistrate erred in law and in fact by convicting the appellant in a trial based on a defective charge sheet;

2. The learned magistrate erred in law and in fact in convicting the appellant when the prosecution did not prove the age of the complainant;

3. The learned magistrate erred in law and in fact in basing his decision on improperly obtained evidence from the complainant;

4. The learned magistrate erred in law and in fact in failing to hold that the medical evidence was not conclusive;

5. The learned magistrate erred in law and in fact in failing to observe that the appellant was not supplied with the witness statements;

6. The learned magistrate erred in law and in fact in failing to appreciate that the case against the appellant was never investigated;

7. The learned magistrate erred in law and in fact in failing to appreciate that the appellant's constitutional rights were violated;

8. The learned magistrate erred in law and in fact in convicting the appellant when the case against him was not proved beyond reasonable doubt.

As always, it is incumbent upon this court, exercising its appellate jurisdiction, to evaluate the evidence afresh and come to its own conclusions though bearing in mind that the trial court had the advantage of seeing and hearing the witness. It was so stated in the Court of Appeal decision of **Okeno versus Republic (1972) EA 32**, where the court remarked that:-

> **An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).**

The prosecution evidence was made up of six prosecution witnesses constituting the complainant **(PW1)**, the complainant's parents **(PW2** and **PW3** respectively), the appellant's employer's daughter **(PW4),** a medical officer **(PW5)** and a police officer **(PW6).**

The complainant, **GM (PW1)**, testified that she was aged 13 and in class 7 at [Particulars Withheld] Primary School. She recalled that on 8th November, 2008 at about 5.30 pm her mother **(PW2)** sent her to her aunt's place, that is, the appellant's employer's home. She did not find her and so she decided to go back home. Just before she left the compound, she was accosted by the appellant who carried her to his house, apparently within the same compound. She said she could not scream because the appellant had covered her mouth. The witness testified that the appellant placed her on his bed and forced some drug into her mouth that led her to lose consciousness. She could not tell what happened after that but later when she regained her consciousness she found the appellant's cell phone on the table and used it to call her mother informing her that she could not tell where she was. The witness testified that she later found herself at Mukurweini sub-district hospital where she was examined and treated. She later accompanied her parents to Mukurweini police station where her case was apparently reported. The witness identified in court the clothes she was wearing on the material day.

The complainant's mother, **PWN (PW2)** told the court that indeed the complainant was her daughter and that she was aged 13 and was at the time in class eight at [Particulars Withheld] primary school. She also testified that on 8th November, 2008, she sent the complainant to the complainant's aunt, JW. The complainant did not come back home; her husband, **(PW3)** who went looking for her but could not find her at the complainant's aunt's place. According to this witness' evidence, it is only on 10th November, 2008 that the complainant called her on her (this witness') cell phone telling her that she could not tell where she was. The witness informed her husband and together they went to report the matter to the assistant chief. On their way, they passed through the home of the complainant's aunt where they found the complainant's aunt's daughter, **MW (PW4).** The witness told the court that they used MW's cell phone to call the number which the complainant had used to call them. When that number was dialled, the appellant's name appeared on the phone's screen. **MW (PW4)** told them that the name appearing on phone was the appellant's who was then their employee. She showed the complaint's parent's the appellant's house where they found the appellant with the complainant. This witness testified she entered the house together with MW and found the complainant lying naked and unconscious on the appellant's bed. This witness testified that she screamed and apparently her screams attracted members of the public

who came and beat the appellant up. She also testified that they took the complainant to Mukurweini sub-district hospital where she was admitted for three days. She told the court that the complainant was bleeding from her private parts. The witness identified the complainant's clothes and also a blood stained bed cover which was allegedly recovered from the appellant's house.

The complainant's father **LMW (PW3)** testified of the disappearance of the complainant on 8th November, 2011 and the report he made to the assistant chief on 9th and 10th November, 2011. The witness testified that when their daughter called on 10th November, 2011, he saved the cell phone number through which she had called on his own phone but rather than use it to call back, he together with his wife decided to use **MW's (PW4)**cell phone to call their daughter. It is when the appellant's name appeared on the phone's screen that **W** told them that that was their employee's name. The witness also said that his wife and MW entered the appellant's house and found the complainant naked on the appellant's bed. When his wife screamed members of the public were attracted to the scene; they arrested the appellant and escorted him to the assistant chief. The witness testified that he hired a taxi that took his daughter to the hospital where she was admitted for treatment.

MWK (PW4) confirmed that indeed the appellant was their employee. She testified that on 10th November, 2008, the complainant's parents used her cell phone to call the number their daughter had used to call them. She testified that the appellant's name popped up when the phone number was entered; it is then that she directed the complainant's parents to the appellant's house. The witness said that together with the complainant's mother, they found the complainant lying on the appellant's bed, naked.

Dr Kamami Samuel Mwangi (PW5) produced the P3 form on behalf of Dr Kimathi who apparently examined the complainant but could not testify because, according to Dr Kamami, his whereabouts were unknown. He, however, said that he was familiar with Dr Kamami's handwriting and signature and for that reason he could produce the P3 he had filled. In his evidence, the doctor testified that the complainant was examined on 28th November, 2008. The complainant was found to be in a fair general condition but hysterical. No injuries were found on the external genitalia and that her hymen was broken.

Apart from producing the P3 filled in respect of the complainant, this witness also produced the P3 form filled in respect of the appellant who had been assaulted by persons known to him. This particular form was filled by one **Joseph Njoroge Kinyanjui** whom the witness described as one of their medical staff. No explanation was proffered why Joseph Njoroge Kinyanjui himself could not produce the report.

The final prosecution witness to testify was **Corporal Alfred Timbwa (PW6)** who was attached at Mukurweini police station at the material time. He told the court that the case was investigated by police constable Cheruiyot who had been transferred to Nyeri Provincial Headquarters. All the witness did was to produce the complainant's clothes and the alleged appellant's bed sheet; he told the court that he could not tell how the exhibits were recovered and he did not know how the appellant was arrested.

The appellant, on his part, gave an unsworn testimony in which he admitted that he was an employee of one Jane Kang'ethe. He said that on 10th November, 2009, at about 7.30 pm, he was asleep in his house when someone knocked at his door. When he opened it he saw five masked people who set upon him and beat him while shouting that he was a thief. These people took him to the assistant chief who took him to the police station at Mukurweini.

That is as far as the prosecution and the defence case went.

Both the prosecution and the defence evidence must be analysed in the context of the offence of which the appellant was charged and convicted and to this end it is necessary to reproduce here the relevant provision of the law which is **section 8(1) (3)** of the **Sexual Offences Act;** this provision says:-

> **8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement**.

(2) ….

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

Section (1) defines the offence of defilement and therefore before **section 8(3)** comes into play, the prosecution must first prove that the offence of defilement as defined under **section 8(1)** was committed. An important element in this definition is the act of "penetration" which has itself been defined in **section 2** of the Act as **"***the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

The question that logically follows, as far as the case against the appellant is concerned, is whether, from the evidence presented at the trial, it can conclusively be said that there was "*partial or complete insertion of the genital organs"* of the appellant into the genital organs of the complainant.

The only person who could answer this question was the complainant herself; however, it is noted that nowhere in her evidence did she ever mention, let alone describe or illustrate how the appellant could possibly have sexually assaulted her. I also note that no such particulars were given in the particulars of the offence in the charge sheet.

The fact that the complainant's hymen was broken as stated by the doctor does not *ipso facto* imply that the only means through which this form of sexual assault could have been perpetrated is by the insertion of the appellant's genital organs into the complainant's genital organs; at least no evidence was led that such was the case and there was no other possibility. I am minded that the complainant testified that she was drugged and lost consciousness and therefore one could possibly argue that she was not conscious enough to tell how the appellant may have sexually assaulted her. That could have been so but again there was no proof whatsoever that the appellant was under the influence of drugs before or immediately after she was rescued from where she had allegedly been confined. If she was taken to hospital soon after she had been rescued as was alleged, it is difficult to understand why nothing was mentioned about the state of her consciousness and whether her senses had been impaired, albeit, temporarily.

There is another reason for casting aspersions on the prosecution evidence on the defilement of the complainant; the parents of the complainant were consistent that the complainant was taken to hospital immediately after she was rescued and that she was admitted in Mukurweini sub-district hospital for three days. There was, however, no evidence that this actually happened; no medical evidence of whatever nature was produced to show that the complainant was ever admitted at this particular hospital or was even treated at this medical as an out-patient. All that was produced was a P3 form showing that the complainant was examined three weeks after the alleged offence was committed and by a doctor whose whereabouts were unknown. In that P3 there is no indication that the complainant received any treatment prior to examination and the space provided for in that form for that purpose was curiously left blank. With all these gaps in the evidence on this aspect of the offence for which the appellant was convicted, I am not persuaded that it was proved beyond all reasonable doubt that the offence of defilement was committed as alleged.

I note that the learned magistrate was equally baffled by the nature of the medical evidence presented before him; in his judgment, the learned magistrate noted the sketchy medical findings in the P3 form and also observed, quite correctly, that although the alleged offence was allegedly committed between the 8th and 10th day of November, 2008, it was not until the 28th day of November, 2008, three weeks later, that the complaint was examined. This prompted the learned magistrate to remark in his judgment that "…***I was shocked by the scant findings on the P3 form, and the period it took to examine the complainant!"***

Despite his reservations about the medical evidence, the learned magistrate still went ahead and convicted the appellant on the same evidence and noted:-

> **"Even though the medical evidence herein was not the best this case could have, it is my conclusion that it does confirm that the hymen of a 13 year old girl had been broken. No other circumstances are proved to lead to an inference other than the accused is responsible for this medical conclusion."**

With due respect to the learned magistrate, it was not up to the appellant to prove the exculpatory facts; the burden was on the prosecution to prove its case beyond all reasonable doubt. Gaps in the prosecution case cannot be filled by inferences that an accused person could have committed the offence with which he is charged unless he leads evidence to the contrary; taking this direction is tantamount to shifting the burden of proof from the prosecution to the accused person which in itself would be a departure from the basic norms and the very core of the criminal justice.

Lest we forget, in **Woolmington versus DPP (1935) UKHL, 1 (1935) AC 462** where the principle of 'proof beyond reasonable doubt' was expounded, the House of Lords held that:

> ***"Throughout the web of The English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained…"*** **(Underlining mine).**

The common law of England is and has always been part of our jurisprudence and therefore the principle that the burden is always on the prosecution to prove its case beyond reasonable doubt applies in our legal system with as much force as it does in England.

Even assuming that the learned magistrate was to be taken to have been relying on circumstantial evidence, that cannot also hold because, it is quite possible that, since there was no evidence of any definite date that the complainant may have been defiled, it is quite possible that she could have been sexually assaulted on any other date before 28th November, 2011 and not necessarily between the 8th and 10th of November, 2011 when the appellant is allegedly to have assaulted her. As it were, no explanation was given by the prosecution for the 21 day delay before the complainant was examined. I doubt, in such circumstances an inference of guilt would be safely drawn against the appellant because it cannot be said with any conviction that the inculpatory facts are inconsistent with the appellant's innocence.

My view on this question of circumstantial evidence is influenced by a passage in "**Wills on Circumstantial Evidence"** which was cited with approval in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** where the Court of Appeal of East Africa had this to say on circumstantial evidence:-

> **In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.**

Having come to the conclusion that the offence of defilement was not proved to the required standard, it would be unnecessary to delve into the second aspect of the offence for which the appellant was convicted which is proof of age of the complainant; however, I feel inclined to say something, however brief it might be, on this question of age if not for anything else, to remind the prosecutors of the importance of age assessment of child victims in sexual offence cases.

It is noted from the evidence that apart from the complainant's and her parent's statement that the complainant was aged thirteen, there was no independent evidence or proof that the complainant was in fact of that age. As usual, what was indicated in the P3 form in this regard was the "estimated age" of the complainant which for purposes of the offences under **section 8(1)** of the Act cannot be assumed to be a conclusive proof of the age of a victim of a sexual offence. A few decisions from Court of Appeal illustrate this point better; in **Criminal Appeal No. 164 of 2009**, **Dennis Abuya versus Republic**, the Court of Appeal sitting at Kisumu held that an **"estimated age"** indicated by a clinical officer in a P3 form cannot be held to be sufficient proof of one's age. The learned judges(R.S.C. Omolo, J.W. Onyango Otieno, J.G. Nyamu JJA, as they then were) said:

> **There is a P3 form in the record before us and it shows that on 26th June, 2007, the appellant's "Estimated age" was eighteen years. By "estimated age" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at that date he was said to have committed the offence.**

In that appeal, the appellant had been convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act** and the issue that arose in the appeal was whether having been so convicted the appellant ought to have been committed to a borstal institution rather than imprisoned for life. For reasons given in the Court's judgment an excerpt of which has been reproduced above, the learned judges allowed the appeal and remitted the case to the High Court with the direction that the Court calls for evidence establishing the appellant's age.

The point here is that the age indicated in a P3 form as "the estimated" age of either the victim or the villain of a sexual offence is not a conclusive proof of that particular person's age; there is need for evidence ascertaining *conclusively* a person's age whenever the question of his or her age arises.

In my earlier decisions on this question I have always been of the humble view that conclusive ascertainment of age is certainly an issue where a person is charged under **section 8(1), (2), (3)** and **(4)** of the **Sexual Offences Act**. As earlier noted s**ub-section (1)** of **section 8** merely defines the offence of defilement but **sub-sections (2), (3)** and **(4)** thereof define the respective sentences meted out against convicts of this offence based on the ages of their victims; the younger the victim the severer the sentence is.

The importance of ascertainment of age in sexual offences was also alluded to by the **Court of Appeal in Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic.** At page 7 and 8 of its decision, the Court of Appeal had this to say:-

> **Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.**

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

> **In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother Margaret Adhiambo when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is**

favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.

The court concluded that ***"prove of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars***".

In the case against the appellant, there was no proof of the complainant's age at least in the manner outlined by the Court of Appeal in the foregoing decisions; it follows that even if the state had proved that the appellant had defiled the complainant, it was not proved that the appellant deserved to be convicted under **section 8(3)** of the **Sexual Offences** Act. I would therefore conclude that from whichever angle one looks at the prosecution case, it was not proved beyond reasonable doubt. I, therefore, find that the appellant's appeal is merited and I hereby allow it. His conviction is quashed and the sentence is set aside. The appellant is set free forthwith unless he is otherwise lawfully held.

Dated, signed and delivered in open court this 13th April, 2015

Ngaah Jairus

JUDGE