



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL APPEAL NO. 76 OF 2014**

**(Formerly Mombasa HC CR. Appeal No. 68 of 2014)**

**M M N ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*[Being appeals from original conviction and sentence in Criminal Case No. 55 of 2013 made on 13<sup>th</sup> February 2014 by the Senior Resident Magistrate's Court at Wundanyi (the Hon. M. Chesang, Ag. SRM)]*

**JUDGMENT**

**INTRODUCTION**

0. This is a judgment on first appeal from original conviction and sentence of the Senior Resident Magistrate's Court at Wundanyi Criminal Case No. 55 of 2013. The appellants were convicted for the offence of defilement of a girl contrary to section 8(1) as read with section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for 20 years on 13<sup>th</sup> February 2014.
0. *The particulars of the offence were that –*

***“PARTICULARS OF OFFENCE:***        *M M N - On the 3<sup>RD</sup> day of December 2012 at Wumingu Location within Taita-Taveta County, intentionally caused his penis to penetrate in the vagina of R W a child aged 12 years.”*

0. The appellant pleaded guilty to the charge and the facts relied upon by the prosecution were read out in court and the relevant Medical Examination Report Police P3 produced in court and upon confirmation of the correctness of the facts as set out by the prosecution, the appellant was convicted for the offence of incest sentenced to serve imprisonment for 20 years.

**The prosecution's case**

0. In brief, the prosecution's case was set out in the **statement of facts** as shown in the following full record of proceedings in the trial court:

**“REPUBLIC OF KENYA**

**IN THE SENIOR MAGISTRATE'S COURT AT WUNDANYI**

**CRIMINAL CASE NO. 55 OF 2013**

PROSECUTOR ..... REPUBLIC

**VERSUS**

ACCUSED..... M M N

**13/02/2013**

*Before M. Chesang (Mrs.) - Ag. Senior Resident Magistrate*

*Prosecutor IP Milimo*

*Court clerk Victor*

*Accused present*

*The substance of the charge and every element of it read and explained to accused and understood. Accused in his own words replies;-*

**MAIN COUNT**

*Accused – Ni kweli. It is true.*

*Court – Plea of guilty is entered.*

**FACTS**

*On 3/12/12 at 10a.m. the complainant was sent to the shop by the mother at Mgambonyi shopping centre. While on the way the complainant met the accused who called her into a shamba that was nearby wherein he defiled her. The complainant shouted for help but no one heard her shouts of distress. She reported the incident to her mother and was escorted to Wundanyi police station. A P3 form was issued to the complainant. She was treated and discharged. Accused was arrested later and charged with the present offence. The P3 form that was filled by the clinical officer is here and I would like to produce the same as exhibit 1. That is all.*

*Accused – Maelezo ni ya kweli. The facts are true.*

*Court – Accused convicted on own plea of guilty.*

*Records – May the accused be treated as a first offender.*

*Mitigation – I ask for forgiveness.*

*Court – Taking into consideration the nature of the offence and mitigation by the accused and the relevant law, accused is sentenced to serve twenty (20) years imprisonment. Right of appeal within 14 days.*

**M. CHESANG (MRS.)**

**Ag. SENIOR RESIDENT MAGISTRATE**

**13/2/13”**

**THE APPEAL**

0. By virtue of his plea of guilty pursuant to section 348 of the Criminal Procedure Code, the appellant could only appeal against the sentence which he challenged on the sole ground of his Amended Grounds of Appeal that “no birth certificate or an age assessment report was produced before the passing of the 20 years sentence to prove the exact age of the complainant as required in section 8 (3) of the Sexual Offences Act.”
0. During the hearing of the appeal, the appellant filed written submissions in court while, Ms. Nyakoni, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

### **THE ISSUE FOR DETERMINATION BEFORE THE COURT**

0. The issue for determination before the court is whether the lack of a birth certificate or age assessment on the complainant vitiated the sentence under section 8 (3) of the Sexual Offences Act 2006.

### **DETERMINATION**

0. Section 348 of the Criminal Procedure Code provides that no appeal shall lie against a plea of guilty save to the severity of the sentence in these specific terms:

*“348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”*

0. As shown in the proceedings of the trial court set out above, the appellant accepted the charge and the particulars of the charge and facts of the case which were explained to him in Kiswahili language and he responded in the same language. No question of equivocalness of the plea arose. The appellant was properly convicted on his own plea of guilty.
0. The age of the complainant was set out in the particulars of the charge as 12 years. The same age was given in the Medical Examination Report dated 7th December 2012 produced in Court as Ex.1. In accepting the charge, its particulars and facts, the appellant must be taken to accept that the age of the complainant was as given in the particulars and the Medical Examination Report (Form P3). This court finds it proved that the complainant’s age was 12 years at the time of the defilement on the basis of the Medical Examination Report Ex. No. 1, which gave the age of the complainant as 12 years. In terms of section 3 (2) of the Evidence Act, **“(2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.”**
0. As held by the Court of Appeal (Koome, Musinga & Otieno-Odek, JJA.) in ***J.W.A. v. Republic*** (2014) eKLR, the lack of a birth certificate and or age assessment report does not preclude a court from making a finding on the fact of age of a complainant. The Court said:

*“The gist of the appellant’s appeal is that there is material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant; that the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. It is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1 signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1989 and was thus 10 years old in 2009, when the offence was committed; the P3 Form tendered in evidence as Exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the two courts below and we are satisfied that the evidence on record shows that the age of the*

***complainant was proved to be 10 years.”***

0. For its part, the trial court must have made a finding of fact of the complainant’s age on the basis of the appellant’s plea of guilty to the charge as laid out and the evidence of the facts and exhibit of the Medical Examination Report when in sentencing the court said ***“Taking into account the nature of the offence and mitigation by the accused and the relevant law, accused is sentenced to serve twenty (20) years imprisonment.”*** The imprisonment term of twenty (20) years is the minimum penalty provided under section 8 (3) of the sexual Offences Act in cases of defilement of a girl where the victim is between 12 and 15 years, as follows:

***“8. (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.”***

0. This Court will, therefore, not interfere with the sentence imposed by the trial court.

**ORDERS**

0. Accordingly, for the reasons set out above, I find that appellant’s appeal herein is without merit and dismiss the same.

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JULY 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

..... for the Appellant

..... for the Respondent

..... Court Assistant.