REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 196 OF 2011

J M W……………………………..APPELLANT

VERSUS

REPUBLIC……………………..RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court,

Sexual Offence Case No.21 of 2010 by Hon. B.T. Jaden, Chief Magistrate on 11th July, 2011)

J U D G M E N T

1. **J M W,** hereinafter **"The Appellant"** was charged with the offence of **defilement** contrary to **section 8(1) (2) of the Sexual Offences Act**. Particulars of the offence being that on the **13th** day of **November, 2009** in **Machakos District** within **Eastern Province**, intentionally and unlawfully caused his penis to penetrate the vagina of **M W** a child aged **7 years.**

2. In the alternative he was charged with the offence of **committing an indecent act** with a child contrary to section **11(1) of the Sexual Offences Act No 3 of 2006**. Particulars of the offence being that on the **13th** day of **November, 2009** in **Machakos District** within **Eastern Province** intentionally and unlawfully touched the vagina of **M W** a child aged **7 years** with his penis.

3. He was tried, convicted on the main count and sentenced to life imprisonment.

4. Being aggrieved by the conviction and sentence thereof, by an amended memorandum of appeal he appealed on grounds that the learned trial magistrate erred in law and fact in:

-Holding that the charge was proved beyond a reasonable doubt.

-Failing to find that a doubt was created to secure an acquittal.

-Misapprehending the relevance of the date of the report made to the police.

-Basing the conviction on highly inconsistent and contradictory evidence.

5. Briefly, facts of the case were that **PW2 M M** lived with his grandchildren, **PW1, M W (complainant)** being one of them. On the **14th November, 2009** at about 7.00 am, PW2 saw the complainant spreading a piece of cloth on the seat prior to sitting down. She sought to know what was wrong. The complainant

explained that her genital area and the back were paining as she had hit herself against the chicken pen. The younger sister however, claimed that some **"bad manners"** had been done to her. The complainant then divulged that she had been molested.

6. PW2 reported the matter to the chief then the police. The complainant was examined by **Dr. Muchara** who found her hymen perforated. No injuries were however noted on the labia minora and majora. There were no vaginal tears or laceration. The doctor formed an opinion that the complainant was sexually assaulted. Subsequently the appellant was arrested and charged.

7.When put on his defence the appellant denied having committed the offence. He stated that he is HIV positive and had he committed the offence he would have infected the complainant. He said that he used to cohabit with the complainant's mother from the year 2004 to 2006. He fell sick on **4.1.2006**. He asked her to go to hospital but she declined. He went to hospital and the condition was diagnosed. When he returned home the complainant's mother had left his house.

8. This being the first appellate court it is duty bound to subject the evidence adduced at trial to a fresh review and scrutiny then come to its own conclusion bearing in mind, however, that it did not see or hear witnesses testify **(see Okewo vs Republic (1972) EA 32).**

9. To prove the charge the prosecution had a duty of proving

i. **The age of the complainant.**

ii. **The act of penetration**

iii. **The perpetrator of the offence.**

10.The prosecutor adduced in evidence a document of age assessment of the complainant. She was escorted to **Machakos District Hospital** where her age was assessed by the Medical Superintendant who found her aged about seven (7) years. In the case of **Raphure v The State 2009 2 BLR 97 CA**, it was held that proof of age must be proved beyond any reasonable doubt where it is an essential element in establishing the accused's guilt.

11.In the case of **Francis Omuroni vs Uganda**, Criminal Appeal **No.2 of 2000**, the court of Appeal stated that medical evidence is paramount in determining the age of the Victim and the Doctor is the only person who could professionally determine the age of the victim in the absence of other evidence. Other than such evidence the victim's parent/guardian would adduce evidence to establish that fact. **PW2 M M** the complainant's grandmother stated that the child could have been born in the year 2002. These was evidence proving beyond doubt that the child was seven (7) years old.

12. PW2 realized that the child was having some discomfort. She reported the matter to the police. Subsequently, she was subjected to medical examination. The doctor who examined her found that indeed she was sexually assaulted as her hymen was perforated. Ordinarily, perforation of the hymen may be by sexual intercourse, trauma or an accident. In this case it was not only perforated but there was also white foul smelling discharge in the vagina hence the doctor opining that the complainant was sexually assaulted. Since the hymen was not punctured it may have been partial penetration.

This therefore brings us to the issue whether the appellant was the perpetrator who caused the act of penetration?.

13. The complainant was subjected to ***voire dire*** explanation. She did not comprehend the meaning of oath therefore gave unsworn evidence. She told the court that the appellant did **"bad manners"** to her. At the outset, when PW2 asked her why she spread a piece of cloth on the seat prior to sitting thereon. She stated that she was in pain as she hit herself on the chicken pen. A child younger than her is the one who divulged the information. This child did not testify. And none of the witnesses who testified were eye witnesses to what transpired.

14. In her unsworn testimony the complainant stated that the appellant made her lie down, having removed her knickers. He put the organ he uses to urinate into hers. She felt pain and he left her. This was a child of tender years **(see section 2 of the children Act). Section 124** of the **Evidence Act** provides thus:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".**

15.The trial court summarized evidence adduced by the complainant and remarked that;

> **"The above narrative by the complainant leaves no doubt that there was no penetration of her vagina by the assailants penis"**

After analysis of evidence in total the court stated thus;

> **"I have considered both the prosecution case and the defence case as analyzed above. I find the prosecution case strong. The defence raised has not cast any reasonable doubt on the same"**

16.Nowhere in the proceedings and/or judgment were reasons recorded why the court believed the complainant a child of tender age as having been truthful. Consequently there was no compliance of the proviso to **section 124** of the **Evidence Act.** Therefore, there was no proof beyond doubt that the perpetrator of the offence was the appellant.

-In the result the appeal succeeds. The conviction is quashed and sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **KITUI** this **24th** day of **September, 2015.**

L. MUTENDE

JUDGE