**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 103 OF 2014**

***(From original conviction and sentence in criminal case No. 426 of 2011 of the Principal Magistrate's Court at Mwingi-H.M.Nyaberi – Ag SPM)***

**JOHN NGUI ………………………………………………. APPELLANT**

**V E R S U S**

**REPUBLIC ……………………………………………….. STATE**

**JUDGMENT**

The appellant was charged with defilement of a girl contrary to section 9(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 18th January 2011 at [Particulars Withheld] village Kyethani Location in Mwingi District within Kitui County did an act which caused the penetration of his male genital organ namely penis into the female genital organ namely vagina of E.M.M a girl aged 17 years.

In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the alternative offence were that on the same day and place committed an indecent act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of E.M.M a girl of the age of 17 years. He denied both charges. After a full trial he was convicted on the main count of defilement and sentenced to serve 15 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed initial grounds of appeal on 1st December 2014. On 1st July 2015 however, he filed an amended petition of appeal which he relied upon. His grounds of appeal are as follows:-

1. The trial Magistrate erred in law and fact to convict him without considering that the complainant's age was not proved beyond reasonable doubt.
2. The trial magistrate erred in failing to consider that the complainant deceived him that she was 19 years of age.
3. The claim by the trial magistrate that the complainant was a school girl did not have any effect in a defilement case, since the age was the determinant under the Sexual Offences Act.
4. The magistrate erred in law and fact to convict him in reliance on DNA test without putting into consideration that there was no accused's representative during the collection of samples.
5. The trial magistrate erred in law and fact to convict him without considering that the prosecution evidence was contradictory and inconsistent.
6. The trial magistrate erred in law and fact to convict him without considering that the evidence adduced was not enough to establish conviction.

The appellant also filed written submissions which I have perused and considered. At the hearing of the appeal the appellant elected to rely on the written submissions and opted not to make oral submissions.

Learned Prosecuting Counsel Mr. Orwa submitted that page 21 of the record of the trial court was confusing. Though it was on record that a birth certificate was produced, same was missing. The said birth certificate was also not in the list of exhibits. Counsel left the matter to this court for decision.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate the evidence on record and come to my own conclusions – see the case of ***Okeno – vs- Republic (1972) EA 32***.

I have re-evaluated the evidence on record. The two main grounds of appeal canvassed by the appellant in submissions relate to the age of the complainant and the reliability of the DNA test. The Learned Prosecuting Counsel has left the appeal to the court to decide, mainly with regard uncertainty over proof of age.

On the DNA test, PW5 Ann Wangeci Nderitu the Government Analyst testified that blood samples were taken from the appellant, the complainant and the infant child R V on 12/9/2013 after the initial samples taken could not produce results. The fresh samples were taken by an officer who was not named and analysis of the samples was done by this witness (PW5). The handling and handing over of the samples from one person to another from the Mwingi Law Courts to Nairobi Government Chemists office was not testified to. The report from the Analyst was that the appellant was the father of the child. However in my view, the prosecution was duty bound to establish the chain of handling and handing over of the blood samples if the Government Analyst's report was to be of useful evidential value in this case. As it is, this court cannot be sure if the samples examined were the ones taken from the people alleged. The court is also not sure if the report emanates from these samples. In my view therefore, the trial court erred in relying on the report of the Government Analyst to found a conviction.

The more serious issue has to do with proof of age of the complainant. The prosecution had the burden of proving the age of the complainant beyond reasonable doubt. Though there is no mandatory requirement that a birth certificate be produced, where it is relied upon it has to be availed to the court for perusal and scrutiny. In the present case, the complainant was recorded as having relied on her birth certificate. She was recorded as producing the same as exhibit 1.

At page 21 of the record however the court noted that the said document was missing from the file and stated as follows:-

***"court – the court notes that the birth certificate was marked as P***

***Exhibit 1 A copy is missing from the court records. Witness stepped***

***down. Hearing 13/2/14. Bond extended. Witness summons to issue to***

***the remaining witnesses".***

Thereafter, there is no record that the said witness was recalled nor that the birth certificate was traced. No further reference was made in the trial to the birth certificate. Therefore though the complainant stated that she was born on 2/3/1994 and relied on her birth certificate, and her mother PW2 relied on the same document, it cannot be said that the age of the complainant was proved by the prosecution in the circumstances of this case. The lacuna created by the absence of the birth certificate not having been explained by the prosecution, the court in my view, could not find that the age of the complainant was proved by the prosecution beyond reasonable doubts. Especially in a case where the complainant's alleged age was almost 18 years. The benefit of the doubt created by the evidential gap, should have been given to the appellant and I do so.

Learned Prosecuting Counsel has not opposed the appeal. On account of the gap in the

evidence on the age of the complainant. I agree with him.

For the above reasons, I find merits in the appeal. I allow the appeal and quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 21st day of September 2015.

**GEORGE DULU**

**JUDGE**