



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 234 OF 2010**

**G W W.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Appeal from the judgment of the Chief Magistrate, Nyeri dated 15th September, 2010 in Criminal Case No. 16 of 2009)

**JUDGMENT**

1. The Appellant, **G W W**, was charged with the offence of defilement a girl contrary to **Section 8 (1)(2)** of the **Sexual Offences Act**. The particulars of the charge were that on the 30th day of May, 2010 at [particulars withheld] Village in Nyeri District within the Central Province, the accused unlawfully committed an act to **A.N.** a child aged 12 years which caused penetration.
2. The facts of the case as recorded by the trial court are that on 30th day of May, 2009 the appellant who was the grandfather of **PW1** held her by the right hand and pulled her inside his house and pushed her onto the bed. The Appellant removed **PW1's** inner wear and removed his trouser and then he lay on top of **PW1** and defiled her. **PW1** further stated that the Appellant threatened to kill her if she told anyone about the act.
3. **L N W (PW2)** the grandmother of **PW1** testified how she had come from the shamba and observed that **PW1** looked sickly and smelled foul and upon inquiring **PW1** told her what had transpired. She first examined the complainant to confirm that what had transpired was true then took her to [particulars withheld] Health Centre; they were then referred to Nyeri Provincial Hospital for treatment; she later reported the matter to (**PW5**) the Sub-Chief of the area.
4. The Appellant was arrested on the 31<sup>st</sup> May, 2009 by **PW3 (Jacob Lemasia)** an officer from the DO's office and was escorted to the Nyeri Police Station. **Police Constable Esther Kingori (PW6)** was the investigating officer who carried out the investigations and issued **PW1** with a P3Form to be filled by the Doctor at PGH Nyeri.
5. **Dr. Ajevi Osteen (PW7)** a doctor stationed at Kenyatta National Hospital examined **PW1**; he observed that the Complainant had bruises on her thighs, redness, creamish discharge and bacteria on her private parts; he then formed an opinion that **PW1** had been defiled.
6. The Appellant denied the offence and gave unsworn evidence. He stated that he lived alone and that his wife **PW2** lived with their son in a different house; the two houses were separated by a fence; that he was a night watchman and on the material date he had gone to work till 6.00am; on his way home he passed by a garage at Gatitu; he then went home had lunch and upon his return, presumably to the garage, he was

arrested; this was at 1.00pm

7. After the trial, the Appellant was found guilty and was convicted and sentenced to a term of twenty (20) years.

8. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and Amended Grounds of Appeal which grounds are summarized as follows;

- a. **That the learned magistrate erred in both law and fact in relying on evidence which was riddled with doubts and inconsistencies;**
- b. **That the learned magistrate erred in law and fact by relying on the prosecution evidence that did not meet the required standard;**
- c. **That the learned magistrate erred in law and fact when he rejected his defence.**

9. At the hearing hereof the Appellant relied on his written submissions in support of the appeal and Mr.Njue learned Prosecuting Counsel for the State made oral submissions in response. Hereunder is a brief summary of the submissions made by both parties.

### **APPELLANTS SUBMISSIONS**

10. The appellant submitted that there inconsistencies in the evidence adduced by the prosecution witnesses; PW1 had stated that the incident occurred on the 30/05/2009; whereas the evidence of PW5 stated that the incident occurred on the 29/05/2009.

11. That **PW6** failed to produce the birth certificate to establish the age of **PW1**; therefore the sentence for a term of twenty (20) years was not justified.

12. That the trial magistrate did not intrinsically examine his defence which was more plausible and reliable than the shaky prosecution evidence; particularly the evidence of **PW1** and **PW2** which was based on unfounded allegations.

13. The appellant beseeched the court to re-evaluate the evidence on record and to allow the appeal in its entirety.

### **RESPONDENTS SUBMISSIONS**

14. Counsel opposed the appeal; he confirmed that there were inconsistencies as given by the prosecution witnesses on the date and time the defilement took place; that one witness **PW5** had indicated that the defilement occurred on the 29/05/2009; that her testimony was based on the narration that had been given to her; but all the other six (6) prosecution witnesses particularly **PW1** and **PW2** indicated that the date of defilement was 30/05/2009;

15. That the evidence of **PW1** and **PW2** made these inconsistencies immaterial; further the inconsistencies did not cause the appellant any prejudice and as such were curable under the provisions of Section 382 of the Criminal Procedure Code.

16. On the issue of the age of the appellant, counsel conceded that no documentary evidence was tendered by the prosecution to prove the age of the complainant; Counsel relied on the case of **Fred Omar Omondi vs R (2014) eKLR** where the court held that that the age of a victim of Sexual Offence can be proved by any other mode other than documentary evidence; he submitted that the complainant had stated that she was twelve (12) years old; **PW2** the grandmother had confirmed that the complainant was twelve (12) years old; and **PW7** testified and produced the P3 form (**PExb.1**) wherein he had assessed the age of the complainant as being twelve (12) years; relying on the authority and the above evidence the age of the minor had been proved without any doubt.

17. That documentary evidence was essential only when the age of the victim was between the borderline

of Section 8(2) and 8(3) of the Sexual Offences Act; that the age in this case was not a borderline case;

18. The penalty section on the charge sheet read 8(2) as opposed to 8(3); that the trial magistrate when passing sentence made the proper shift and sentenced the appellant under the provisions of Section 8(3) to a term of twenty years; He relied on the same case of **Fred Omondi (supra)** where Ngenye J held that the trial court is entitled in law to use the proper provisions when passing sentence.

19. On the issue of the *defence of alibi*; counsel submitted that the trial magistrate did consider the unsworn defence of the appellant and found it was not merited.

20. Counsel prayed that the conviction and sentence be confirmed.

### **ISSUES FOR DETERMINATION;**

21. After taking into consideration the submissions of both the Appellant and Respondent this court finds the following issues for determination;

- a. Whether the trial magistrate erred by relying on the inconsistent evidence of the prosecution witnesses;
- b. Whether the omission of the punishment section was fatal; whether the sentence passed was legal; whether the age of victim was proved;
- c. Whether the trial magistrate erred in law and in fact in disregarding the *defence of alibi* tendered by the Appellant;
- d. Whether the prosecution proved its case to the desired threshold of beyond reasonable doubt;

### **ANALYSIS**

22. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

23. The first issue relates to inconsistencies in the evidence of the prosecution witnesses. The major inconsistency raised by the appellant relates to the evidence of the prosecution witnesses on the dates of the act of defilement.

24. This court has perused the court record and notes that only one witness **PW5** stated that the incident occurred on the 29/05/2005.

25. From the evidence on record this court notes that identification of the appellant as the person who defiled her was not an issue; that the complainant recognized the Appellant who was a person well known to her as he was her grandfather; She gave a narrative of what transpired at her grandfathers' house on the 30/05/2009; that she was under no misapprehension that it was the appellant who had defiled her and that he had threatened to kill her using a metal bar if she disclosed what had transpired that day.

26. The evidence of **PW2** the grandmother of **PW1**; testified and indicated that the date of the defilement was the 30/05/2009; that she noted that the complainant looked sickly and was foul smelling; upon inquiring from her on her whereabouts that morning; **PW1** then narrated her ordeal; **PW2** carried out her own examination and confirmed that **PW1** had indeed been defiled; she proceeded to take her for treatment at the nearest clinic; and they were referred to PGH Nyeri;

27. At the hospital **PW7** was the doctor who examined the Complainant and found that she had bruises on her thighs, redness and white discharge on her private parts and formed an opinion that the Complainant had been defiled and also produced the P3form as an exhibit; it was marked as '**PExb1**'.

28. The court record shows that the trial magistrate conducted a '*voire dire*' examination for **PW1** which

examination was in the format of a question and answer.

29. From the questions posed by the trial magistrate, this court is satisfied that he properly conducted the *voire dire* examination and ascertained and established that the minor understood the reasons for testifying and her duty to be truthful.

30. This court reiterates that this one inconsistency was resolved by the cogent evidence from **PW1**, **PW2** and **PW7** who were firm and maintained the correct date of the incident in their testimonies; further this court is satisfied that the said inconsistency did not go to the root and substance of the case by creating or raising a reasonable doubt as to the veracity of the prosecutions' case nor did it raise any doubt as to the credibility of the prosecution witnesses.

31. At this juncture this court makes reference to the proviso of Section 124 of the Evidence Act and adds that the inconsistency raised by the appellant may also be rendered to be immaterial as the proviso permits a court to convict an accused person charged with a sexual offence on the evidence of the victim alone provided it believes the victim.

32. In the light of the above this court is satisfied that this ground of appeal lacks merit and it is hereby disallowed.

33. On the issue of age the appellant submitted that the prosecution did not produce documentary evidence to prove the age of the complainant to form a basis for sentencing.

34. Prosecuting Counsel for the State submitted that in the absence of documentary evidence the testimonies of the prosecution witnesses was sufficient to prove the age of the complainant; that **PW7** produced **PExb.1** which indicated the age of **PW1** as twelve years and this document was also sufficient to prove age.

35. He further submitted that the defect in the charge sheet did not prejudice the appellant and was therefore curable under the provisions of Section 382 of the Criminal Procedure Code.

36. This court is alive to the fact that the age of the victim is a crucial component for purposes of sentencing and must be either assessed or proved beyond reasonable doubt.

37. During the *voire dire* examination the Complainant was asked her age and the answer she gave was thirteen (13) years; but she clarified that the incident occurred the previous year when she was aged twelve (12) years.

38. In her testimony **PW2** the complainant's grandmother gave evidence and confirmed that **PW1** was twelve (12) years of age. The doctor (**PW7**) who examined the Complainant testified and confirmed that **PW1** was twelve (12) years and indicated this on the P3Form which was produced in evidence as **PExb.1**.

39. I have had occasion to peruse the charge sheet and note that it indicates that the appellant was charged with defilement of a girl contrary to Section 8(1) (2) of the Sexual Offences Act. It is apparent that the punishment section was not properly framed and ought to have made reference to Section 8(1) as read with 8(3) as opposed to 8(1)(2) of the Act; On further perusal of the charge sheet I note that the particulars of the offence are properly enunciated and the age of the girl is given as twelve (12) years.

40. This court further notes that the particulars on the charge sheet were set out in clear and unambiguous terms and that the particulars given of the age of the girl was twelve (12) years; the record also shows that the appellant followed the entire proceedings and appreciated the evidence tendered against him; that he was able to cross-examine the prosecution witnesses and even requested for the recall of witnesses.

41. This court makes reference and is guided by the Court of Appeal case of **Robert Mutungi Muumbi vs R [2015] eKLR** where the court held that the failure to refer to the punishment section is not fatal and

is curable, provided the error occasioned no miscarriage of justice to the appellant as the particulars and the essential elements of the offence were defined and disclosed to the him and he was made aware of the charge that he was confronted with.

42. This court is satisfied that **PW7** assessed the complainants' age and furnished the P3 form as documentary evidence which sufficiently proved that the complainant was aged twelve (12) years at the time of the incident; which places it within the provisions of Section 8(3) of the Sexual Offences Act; and is satisfied that any correction will not occasion any miscarriage of justice as the appellant was made aware of the charge against him and the particulars and the essential elements of the offence were disclosed.

43. This ground of appeal is found lacking in merit and is disallowed.

44. The last issue to be addressed relates to the defence of alibi; The appellants evidence which was that on the material date he was on night duty and left work at 6.00am; that before heading home he passed through a garage at Gatitu until 12.00; that he reached his house at 1.00pm and ate food and went back to the garage where he was arrested.

45. I have considered the evidence of the appellant and his alibi is that he was nowhere near home at the time when the offence was alleged to have been committed.

46. The principle for testing the defence of alibi is set out in the case of **Uganda vs Sebyala & others [1969] EA 204** where it was held;

**“.....all the Accused has to do is to create doubt as to the strength of the case of the prosecution”**

47. The entire evidence adduced by the prosecution must be analyzed vis-a vis that of the defence and the court must satisfy itself on whether the appellants defence casts or creates any reasonable doubt as to the veracity of the prosecutions' case.

48. This court notes that the trial court considered the evidence of the prosecution and that of the defence as a whole and found that the prosecutions' evidence was based on cogent evidence that was not shaken nor found to be doubtful.

49. After re-evaluating the evidence as a whole this court is satisfied that the prosecutions' case was based on solid and cogent evidence; and is further satisfied that the evidence of defence of alibi did not displace or cast or create any doubt on the prosecutions' case.

## **FINDINGS**

50. In the light of the forgoing this court makes the following findings;

51. This court finds that the age of the Complainant was proved and that the error in not citing the punishment section is not fatal and is curable under he provisions of Section 382 of the Criminal Procedure Code.

52. This court finds that the defence of alibi did not cast or create any doubt on or displace the prosecutions' case.

53. This court finds that the prosecution proved its case beyond reasonable doubt.

## **DETERMINATION**

54. The appeal is found lacking in merit and is hereby dismissed.

55. The conviction is found to be safe and is hereby upheld.

56. The sentence of 20 years under the provisions of Section 8(2) is hereby set aside and substituted with a sentence of 20 years under the provisions of Section 8(3) of the Act.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 30<sup>th</sup> day of November, 2015.

**A MSHILA**

**JUDGE**