REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 231 OF 2010

ALOIZ KIRAGU NJOROGE……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal against conviction and sentence in Othaya Senior Resident Magistrates' Court Criminal Case No. 217 of 2010(Hon. B.M. Nzakyo (RM)) on 1st September, 2010)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act, No. 3 of 2006.** It was alleged in the particulars of the offence that on the 2nd day of May, 2010 in Nyeri South District with the then Central Province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of R W, a girl aged 13.

In the alternative count, the appellant was charged with the offence of indecent act contrary to **section 11(1)** of the **Sexual Offences Act**, **No. 3 of 2006**. In this count, it was alleged that on the 2nd day of May, 2010 in Nyeri South District within the then Central Province In Nyeri South District, the appellant did an indecent act with R W a child aged 13 by rubbing his penis against RW vagina.

In his judgment the learned magistrate convicted the appellant of both the principal and the alternative counts; for each of these counts the learned magistrate sentenced the appellant to 20 and 10 years imprisonment respectively, both sentences running concurrently.

The appellant appealed against both the conviction and sentences; his grounds of appeal in the petition he filed in court on 14th September, 2010 are set out as follows:-

1. The learned trial magistrate erred in law and in fact in convicting the appellant despite the fact that he was detained in police custody for three days and thus his constitutional rights under **article 49(1) f(i)** of the **Constitution** had been infringed;

2. The learned trial magistrate erred in law and in fact in convicting the appellant irrespective of the fact that there was no medical evidence linking the appellant to the offence for which he was convicted;

3. The learned trial magistrate erred in law and in fact in convicting the appellant despite the fact that essential witnesses were not called by the prosecution;

4. The learned trial magistrate erred in law and in fact convicting the appellant yet no complaint had been received from the school she was attending for the three days that she was alleged to have disappeared from home; and

5. The learned trial magistrate erred in law and in fact in dismissing the appellant's defence.

The appellant asked this court to quash the conviction and set aside the sentences.

Being the first appellate court, this court is under the legal obligation to consider the evidence at the trial afresh and come to its own conclusions which conclusions may or may not be consistent with the magistrate's court factual findings. I am cautious, however, that it is only the magistrate's court that had the advantage of seeing and hearing the witnesses and therefore was in a better position to assess such aspects of their evidence as their demeanour and candour**. (See Okeno versus Republic (1972) EA 32).**

The complainant testified that she was aged 13 and in class five. On 2nd May, 2010, at around 5.00 pm she was walking from her grandmother's home when she met a man who asked her to follow him. Together, they went to the man's house where this apparent stranger is said to have defiled her. The man is alleged to have gone to the complainant's home, picked her school uniform and brought it to his house. She spent two nights at this man's house. Although the man threatened to harm her if she told anybody of her whereabouts, the complainant told "somebody" where she was and acting on that information her grandmother came and took her away. The case was then reported to the police at Kagicha police station where the complainant recorded her statement. She was treated at Gichiche health centre and Othaya district hospital. She testified that she did not know the man who had defiled her but identified the appellant in the dock as the person who had assaulted her.

The complainant's uncle **J M T (PW2)** testified that on 5th May, 2010, he was told by his mother that his niece, the complainant, was missing. He was tasked to look for her but in evening of the same day, she told him that the complainant had been seen at the appellant's house. The witness mobilised members of the public and went to the appellant's house. The appellant is said to have refused to open the door when they knocked and therefore, they forcefully broke the door and entered the appellant's house in which they found the appellant and the complaint. They arrested the appellant and took him to the police station while the complainant was taken to Othaya district hospital the following day. The witness testified that he knew the appellant well.

R W (PW3) testified that she was the complainant's grandmother and that the complainant went missing on 2nd May, 2010. Later, one Wambugu told her that the complainant was at the appellant's house. The witness informed his son **J M T (PW2)**. M is said to have gone to the appellant's house and found the complainant. This witness testified that she also knew the appellant before.

Dr Jean Kinyua (PW4) presented the medical report in respect of the examination and treatment of the complainant; she neither examined nor treated the complainant but she testified that her colleague, Mr Silas Macharia did. According to that report, the complainant was escorted to hospital by her mother. Upon examination it was established that the complainant had no physical injuries. Her hymen was, however, broken and she had sustained vaginal lacerations. She also had epithelial and pus cells in her vagina indicating that she had sexual infections.

The police officer who arrested the appellant and investigated the complaint against the appellant was **Corporal Simon Chirchir (PW5)** who was then based at Chinga police station. It was his evidence that on 5th May, 2010 at around 11.00 pm he received a call to the effect that a suspect was about to be lynched by members of the public at Kagicha on suspicion of defiling a minor. The officer rushed to the scene and found the appellant had been arrested by members of the public. His investigations established that the complainant had been rescued from the appellant's house. According to him the complainant disappeared when she went to church on a Sunday and that was rescued on a Tuesday. According to the investigations officer, the complainant still attended school from the appellant's house for the time she was there. The appellant even prepared breakfast for the appellant and packed her lunch. He found the complainant's clothes in appellant's house. He issued a P3 form to the complainant who was later taken

to hospital for treatment.

The appellant opted to give sworn evidence. He testified that he was with his mother in his mother's house when the offence is said to have been committed. Later, a person he described as "a girl" came at around 8.30 pm and asked him to escort her home. The appellant asked her to join them and eat supper first as they were all having their supper. It was his evidence that people invaded the house and started beating him up. Although he had earlier in his testimony said that he was with his mother in their house, he apparently changed the version of his testimony and said that he was with his wife in the house and at the time he was attacked she was cooking supper.

The appellant relied on written submissions at the hearing of his appeal. Ms Maundu for the state on the other hand submitted orally and opposed the appeal; the learned counsel conceded, however, that it was improper for the lower court to convict the appellant both on the principal and alternative counts. I agree with both the appellant and the learned counsel for the state that the learned magistrate fell into error when he convicted the appellant both on the principal count and the alternative count. The moment the learned magistrate found the appellant to be guilty of the principal count, it was not open for him to convict the appellant on the alternative count as well. I would at the outset quash the conviction of the appellant on the alternative count and set aside the sentence meted out against him on that count accordingly.

Looking at the evidence on record and considering the submissions by both the appellant and the learned counsel for the state, two main issues emerge which the court below ought to have taken into account in determination of the appellant's trial. Firstly, it is the issue whether it was established beyond reasonable doubt that the offence of defilement was established and secondly whether it was equally established that the appellant was the perpetrator of this particular offence.

The offence of defilement is defined in **section 8 (1)** of the **Sexual Offences Act** while its punishment is prescribed in **subsections (2), (3)** and **(4)** of the particular provision. As far as the charge against the appellant was concerned, it was **subsections (1)** and **(3)** of **section 8** that were in issue; these provisions state as follows:-

8. Defilement

> *(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.*

Two critical elements which must be established before one is convicted and sentenced of the offence of defilement under this section are first, the penetration and second, the age of the victim.

"Penetration" itself is defined under **Section 2** of the Act to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*".

The evidence on record suggests that it was established to the required standard that there was penetration of the genital organs of the complainant as understood in **section 2** of the Act. The complainant herself testified that the appellant "did bad manners" to her apparently for the time she spent in the appellant's house. More crucial in this regard was the evidence of the doctor who examined the complainant. According to **Dr Jean Kinyua (PW4)**, the complainant's hymen was broken and had vaginal lacerations. She had epithelial and pus cells. She also had yeast cells. All these symptoms, according to the doctor, were consistent with sexual infections. In the language of **section 2** of the Act, there was in effect "*insertion of the genital organs of a person into the genital organs of the complainant*."

As to whether the appellant was the perpetrator of this offence, there was in my view, overwhelming evidence that it was the appellant who inserted his genital organs into the genital organs of the complainant. It was **R W T (PW3's)** evidence that her granddaughter, the complainant, disappeared on 2nd May, 2010 and it was not until the 5th May, 2010 that she was located in the appellant's house. On that date, the complainant's uncle **JMT (PW2)** mobilised members of the public and went to the appellant's house where they found the appellant together with the complainant. The complainant herself testified that indeed she was removed from the appellant's house and while she was there the appellant "did bad manners" to her.

In his own defence, the appellant did not deny that the complainant was found in his house. His explanation for the complainant's presence in his house was that she had just checked in to be "escorted home" when members of the public stormed the house and started beating him. Initially, the appellant testified that he was with his mother in the latter's house but later in his testimony he said that he was in fact with his wife who was preparing supper when he was attacked and arrested by members of the public.

In my humble view, the prosecution evidence on where the complainant was found and who it was that sexually assaulted her was consistent and uncontroverted; I do not find any basis to doubt its credibility. The appellant's explanation of the complainant's presence in his house was, to say the least, inconsistent and wanting. The legal burden always remains on the prosecution to prove its case beyond reasonable doubt but in this particular case it would have been of help to the appellant if he called either his wife or his mother, whoever it was that was in the house with him at the material time to corroborate his testimony. Suffice it to say, his defence did not displace the prosecution evidence and the learned magistrate was correct to dismiss it.

One final aspect which the trial court appears not to have given the necessary attention yet it so crucial in any conviction under **section 8** of the Act is the age of the complainant. In my previous decisions on this matter and at the risk of repeating myself, I have always held the view that this element of the offence is material because defilement is not defilement as known in law unless it involves an act that causes penetration ***"with a child***". Reference to a "child" here necessarily invites consideration of the age factor in contemplating whether one is guilty or not since it is this particular factor that defines whether one is a child and therefore susceptible to an offence of defilement or not.

Equally important is the understanding that punishment of an offence of defilement under **section 8(1)** is intricately intertwined with the age of the victim of a sexual assault. The severity of the sentence to be meted out upon conviction of an offence under **section 8** (**2), (3)** and **(4)** of the Act is directly proportional to the age of the complainant or the victim of the assault.

In my humble view, therefore, proof of age in a charge of defilement under **section 8** of the Act is as necessary and as much important as proof of the ingredient of penetration; just as penetration has to be proved beyond reasonable doubt, so is the age of a victim of a sexual attack under this provision of the law.

One may ask, and quite legitimately so, what does proof beyond reasonable doubt entail in proof of age where such proof is necessary in establishing an offence under **section 8** of the **Act?** Would the complainant's word of mouth or that of her parents (or any of them) or her guardian's be sufficient?

In the two Court of Appeal decisions that I have come across, and where this issue has arisen, the Court of Appeal is of the view that the word of mouth alone irrespective of whose mouth the word is coming from is insufficient and proof of age in a trial of an offence under **section 8** of the Act demands some sort of documentary proof. The Court, sitting at Kisumu in **Criminal Appeal No. 164 of 2009**, **Dennis Abuya versus Republic** 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 the victim 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.

The importance of ascertainment of age in sexual offences was also alluded to by the **same Court 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***".

Coming back to the evidence in the trial against the appellant, there is no evidence apart from what the complainant herself said that the complainant was aged 13. The closest the prosecution came to providing documentary proof in this case was the production of a P3 form in which the "estimated age" of the victim was indicated as 13 years. As noted, the Court of Appeal in **Dennis Abuya versus Republic (supra)** frowns upon such estimates as conclusive proof of one's age; the rationale appears to be that considering the severity of the sentences prescribed for offences under **section 8(1)** of the **Act**, there must be some substantial proof that would leave no doubt in the mind of the court of the victim's age.

Without the establishment of the age of the complainant, a conviction cannot be sustained under **section 8**

of the Act and I am inclined to conclude that the appellant's conviction cannot be sustained without due regard to the question of whether this particular aspect of the prosecution case was proved beyond reasonable doubt.

It has been noted that despite the prosecution's failure to prove the age of the appellant, there was overwhelming evidence that the appellant sexually assaulted the complainant and in the face of such evidence I have agonised whether the appellant's appeal should be allowed on account of lack of proof of age.

In my previous decisions where this issue has arisen, I have quashed convictions where the age of the complainant has not been proved but in combination with others factors that cast doubt on whether the case against an accused persons in those particular cases, as whole, was proved beyond reasonable doubt. In the instant case, the evidence that the appellant assaulted the appellant has been held to be overwhelming and the question I have had to ask myself is whether this court, exercising its appellate jurisdiction, can order for further evidence to be taken on this particular issue of age. I found the answer in **section 358** of the **Criminal Procedure Code** which suggests that this court can indeed take or call for further evidence whenever it is necessary to do so inorder to meet the ends of justice. That section provides as follows:-

358. Power to take further evidence

> ***(1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.***
>
> ***(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.***
>
> ***(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.***
>
> ***(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court***.

Section 358(1) is pertinent to the issue at hand and in invoking the powers of this court under that particular provision I would direct the subordinate court which tried the appellant to take evidence on the complainant's age inorder for this court to satisfy itself of whether the appellant was properly convicted under **section 8(3)** of the **Sexual Offences Act, No. 3 of 3006.** For this reason, the original trial record shall be remitted to the subordinate court and I hereby direct that court to comply with **section 358(2) of the Criminal Procedure Code** and take the evidence and certify it to this court within 60 days of the date of this judgment to enable it dispose this appeal. It is so ordered.

Signed, dated and delivered in open court this 14th December, 2015

Ngaah Jairus

JUDGE