**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 105 OF 2009**

**PETER MUNYWOKI KATU.....APPELLANT**

**VERUS**

**REPUBLIC.....RESPOPNDENT**

[From the Original conviction and sentence in Criminal Case No. 2285/2006 in the

Chief Magistrate's Court at Machakos -Mrs. E Nderitu (SRM) on 20/1/2009)

**JUDGEMENT**

The appellant herein **Peter Munywoki Katu** was charged with the Offence of **Defilement contrary** *to* **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act No.3 of 200**6. Particulars being that on the 29th day of October, 2006 at ***[particulars withheld]*** Village, Muthei Sub-Location, of Masii Location, in Machakos District within Eastern Province, unlawfully had carnal knowledge of M.T a girl under the age of sixteen years.

He was also charged with alternative charge of Indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** .

Particulars were that on the 29th day of October, 2006 at ***[particulars withheld ]*** Village, Muthei sub-location, of Masii location, in Machakos District ,within Eastern Province, unlawfully and Indecently assaulted M.T by touching her private parts namely vagina.

The appellant pleaded not guilty and prosecution called a total of five witnesses. Appellant gave a sworn defence, called no witness and denied committing the offence. However, after the trial, he was convicted on the offence of ***Defilement and sentenced to serve 20 years imprisonment.***

The appellant was dissatisfied with the verdict of the trial court and thus filed this Appeal. He challenged his conviction on various grounds.

1. *That the appellant was substantially prejudiced and was not accorded a fair and impartial trial as per the provisions of* ***Section 25 (c) of the Constitution*** *as he was forced to participate in to the conduct of the trial while sick.*

*2. That the entire trial was a nullity as the charge was defective and the trial proceeded on wrong particulars as Section 8(1) (2) of the Sexual Offences Act was not appropriate Section to have been*

*charged with.*

*3. That there was a reasonable cause for suspicion in relation to his arrest in that he was unlawfully detained for more than 24 hrs yet no reason was offered for the same.*

*4. The Trial magistrate made an error in both law and facts by failing to subject PW1's evidence to thorough examination, more so given that this was a case of a single witness.*

On the date of the appeal, the appellant filed his written submissions which he relied on entirely.

**M/s Kwamboka** the learned State Counsel opposed the appeal. She submitted that there was sufficient evidence to convict the appellant. That the complainant positively identified the appellant as her defiler as the offence was committed at broad daylight. That PW1's P3 form showed that she was indeed defiled and she had a broken hymen and she had visible vagina tear. She urged the court to uphold the conviction and the sentence.

I have now analysed and re-evaluated the evidence on record afresh while keeping in mind that I did not have the advantage of seeing the witnesses while they testified as the trial court and so I cannot comment their demeanour. I am guided by the case of **Okeno Vs Republic 1972 (EA) 32**

> ***" An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence".***

The prosecution case was that the complainant herein a girl aged 12 years was on her way home on the material day from the shop. That she used a footpath passing through a farm in which the appellant was grazing. That the appellant called her and instructed her to stop. Further that the appellant was holding a knife. The appellant then led her to the bush where he laid her down face up and removed her under pant .He laid on her and inserted his penis inside her vagina and started to defile her. That there was no homestead nearby and her screams yielded no help.

Then the appellant heard voices of people passing on the road and he stood up and ran away. Thereafter, the complainant ran home and did not inform anyone until 1/11/2006 when she reported to her sister PW2 what had happened. PW2 reported the matter to their mother PW3, and then PW3 inquired from PW1 what had happened. The next day, PW1 went to Masii Township and told PW3 she had seen her defiler who was grazing the cattle nearby. However, by that time, the defiler had gone away. The next day, PW3 went to the appellant's employer where she found the appellant. He was taken to Masii Police Station and PW5 investigated the matter and charged the appellant with the present offence.

PW1 was treated and examined and her P3 form was filled by PW4 who noted that her hymen was missing and she had visible vagina tear. PW1 also had numerous epithelial cells and gram positive. However, she had no spermatozoa as she was examined seven days after the offence was committed. PW4 testified that the appellant had tested HIV positive and so PW1 was put on post –exposure drugs for protection. The appellant was arrested and charged with the present offence.

On his Defence, the appellant denied the charge. He admitted that on the material day, he was grazing in a farm which was 2 km from PW1's homestead. That he was not alone as he was in the same farm where a woman called Maria was working. He further told the court he left the farm at 3.00p.m and Maria was left behind. However, the trial magistrate dismissed the appellant's Defence and found that prosecution had proved case beyond a reasonable doubt. The learned trial magistrate convicted the appellant and sentenced him to 20 years imprisonment.

I have now analysed and re-evaluated the evidence on record. It was alleged in the particulars of the charge that the complainant was under the age of 16 years.

I have noted that the trial magistrate conducted a **Voire dire** examination on the minor, who stated that she was aged 12 years. However, her mother PW 3, did not state the age of the complainant in her

evidence. The Doctor who filled the P3 form stated that the complainant was approximately 10 years of age. Though the Appellant submitted that the charge was defective as he was tried under wrong particulars that is **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**, I find that the learned trial magistrate sentence the appellant to 20 years imprisonment which is the minimum sentenced imposed on a person convicted for defiling a child between the age of twelve and fifteen years. Though the wrong Section was quoted, the offence was disclosed and no evidence that the appellant was prejudiced at all. He fully participated in the trial. The defects can be cured by ***Section 382 of the Criminal Procedure Code*** which provides that: -

> ***" Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge,proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings"***

Though the prosecution did not produce any document to proof the age of the complainant herein, the trial magistrate noted in the judgment that:-

> "***Indeed the court noticed the witness PW I was of tender age and hence a <u>Voire dire</u> examination***"

I warn myself that I did not have the advantage of seeing the witnesses. I have no reasons to doubt the trial magistrate's findings that the complainant was aged 12 years thus under the age of the 16 years. The particulars of the charge sheet were not defective as submitted by the Appellant.

I have also considered the P3 form that was produced by PW 4. The P3 form showed that PW 1, had a torn hymen with visible vagina tears. The Doctor also noted that she had many epithelial cells and grams positive. He further remarked the alleged assailant was reactive to HIV and thus placed her on Post – exposure drugs. The complainant was treated 7 days after the alleged offence. The Appellant was arrested on 5th November 2006 about the same time PW1 was treated. However, there is no evidence whether the appellant was medically examined. Though PW 4 stated that he was reactive to ***HIV***, there was no medical report produced to that effect. There were epithelial cells and gram positive noted on the vagina swab of PW I. she also had "**whitish cuddle like discharge**" .That was indication of an infection. However, the Appellant was not tested medically to find out if he had any infection and that he could have infected PW I. There is no P3 form produced for the Appellant. There was also no DNA test done on the Appellant to link the epithelial cells found in the vagina swab of the complainant to the Appellant.

From the medical evidence produced by PW 4, there is no doubt that PW I was defiled. The issue now for determination is whether prosecution was able to prove that she was defiled by the the appellant herein.

I have taken into account that this is a sexual offence and in most cases only the victim and defiler are present during the commission of such offence. That was the reason why the legislators found it wise to include the proviso to **Section 124 of the Evidence Act** which provides that: -

> **"Provided that where 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 alleged victim is telling the truth."**

In her findings, the learned trial magistrate stated that:

> "**The law is clear that in Sexual offences evidence of a single witness being the victim of the offence is sufficient to base a conviction if court is satisfied that the same is <u>consisted as to</u>**

**leave no room for errors**."

She further observed that: -

> **"I have no doubt that PW1's evidence measures up to that standard. The offence having happened on broad day light, PW I was able to see the defiler well. She pointed out that was not the first time to see him having seen him before she was indeed able to identify him when she saw him again some days after the offence. I have no doubt that accused was positively identified."**

I have re-evaluated the evidence of PW I and I noted that she testified as follows: -

> ***"This is the person who defiled me. He used to graze in that forest. I was not present when he was arrested. I later saw him with the stock he was grazing and I told mother***"

It should be noted that PW 2 was the first person who received the information from PW I that she had been defiled. PW 2 told the court that: -

> **"She did not tell me the man. I did not know accused**".

In her evidence, PW 3 told the court that when PW I reported to her that she had been defiled and she also told her she could identify the defiler. However, PW 3 told the court that when on the following day, PW I allegedly identified the defiler grazing at Masii area, and informed PW 3, PW 3 went to look for him but he was gone. PW I was, therefore, not present when PW 3 went to the Appellant's employer. It was not clear how PW 3 came to the conclusion that the person that PWI referred to as her defiler was the appellant herein.

Though the trial magistrate stated that the evidence of PW I was consisted and left no room for error, I found that was not the position. On 1st November, 2006, she did not inform her sister PW 2 who the man was. She also told the court when the appellant was arrested, she was not present. How was he identified? I find inconsistencies on the evidence of PW 1, PW 2 and PW 3 on the identity of the defiler. Section 124 provides that the court can convict on the evidence of a single witness so long as the trial magistrate state the reasons in the proceedings why he/she believed the alleged victim was telling the truth. The trial magistrate stated on page 36 of the judgment: -

> **"There was no reason given or even alluded as to why PW I would give false evidence."**

The trial magistrate did not, therefore, state the reasons why she believed the alleged victim (PW I) was telling the truth. The evidence of PW I was based on recognition but the court has to be certain that such recognition was not based on any mistake or error.

PW I testified that she identified the Appellant as she used to see him grazing around that area. I have to receive that evidence with a lot of caution because there is a grave possibility of a miscarriage of justice occasioned by misidentification. I rely on the case of **Roria Vs R (1967) EA 583,** where the Court of Appeal held that: -

> **"A conviction resting entirely on identity invariably causes a degree of uneasiness"**

In the instant case, I find that uneasiness and I do hold that it was not safe to convict the Appellant only on the evidence of recognition of the Appellant by PW I. I am also guided by the case of **Wamunga Vs Republic Cri.Appeal No. 20 of 1989 KLR Pg 424,** where the Court of Appeal held that:-

> ***"Where the only evidence against a Defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction***".

Having now analyzed and re-evaluated the available evidence and having found that the Medical Report did not link the Appellant to the commission of the offence and having found that the evidence of recognition was shaky, I proceed to find that the trial magistrate convicted the Appellant herein on evidence that was not sound enough to erase any doubt. Prosecution, therefore, did not prove its case beyond a reasonable doubt.

For the above reasons, I find that the appellant appeal has merit. I therefore quash the conviction and set aside the sentence. Consequently, I order the release of the Appellant forthwith unless he is lawfully held.

Appeal succeeds.

**L .N .GACHERU**

**JUDGE**

Dated, Signed and delivered at **MACHAKOS** this 21st day of January 2014.

**B. T. JADEN**

**JUDGE**