



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. 32 OF 2011**

**SOMO LARAU HAJUFLE ..... APPELLANT**

**VERSUS**

**REPUBLIC**

*(Being an appeal from the conviction and sentence of Hon. S. Gacheru Senior Resident Magistrate delivered on 22/9/2010 in Machakos Chief Magistrate Sexual Offence Case No. 9 of 2008)*

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*(Before Hon. B. Thurania Jaden J)*

**J U D G M E N T**

1. The Appellant, **Somo Larau Hajufley**, was charged with two counts of defilement contrary to **section 8 (3)** of the **Sexual Offences Act**. In count I, the particulars of the offence were that on the 2<sup>nd</sup> day of August 2008 at **Kitengela Township** in **Kajiado District** within **Rift Valley Province**, unlawfully had carnal knowledge of **A M** a girl of 12 years of age.

In the alternative, the Appellant was charged with the offence of committing an indecent act to child contrary to **section 11 (3)** of the **Sexual Offences Act 2006**.

The particulars of the offence were that on the 2<sup>nd</sup> day of August 2008 at **Kitengela Township** in **Kajiado District** within **Rift Valley Province**, committed an indecent act with **A M** by touching her private parts.

2. In Count II, the Appellant was charged with the offence of defilement of a girl contrary to **section 8 (3)** of the **Sexual Offences Act 2006**.

The particulars of the offence were that on the 6<sup>th</sup> day of August 2008 at **Kitengela Township** in **Kajiado District** within **Rift Valley Province**, unlawfully had carnal knowledge of **A M** a girl of 12 years of age.

In the alternative, the Appellant was charged with the offence of committing an indecent act to a child contrary to **section 11 (3)** of the **Sexual Offences Act 2006**.

The particulars of the offence were that on the 6<sup>th</sup> day of August 2008 at **Kitengela Township** in **Kajiado District** within **Rift Valley Province**, committed an indecent act with **A M** by touching her private parts.

3. When the Appellant was arraigned before the court, he pleaded not guilty. After a full trial, the Appellant was convicted for the offence of defilement in both count I and II and sentenced to serve 20 years imprisonment in each count. The sentence runs concurrently.
4. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. The Appellant raised 21 grounds of appeal. The said grounds can be summarized as follows:-
  - v. **That similar allegations against other people had been raised by the complainant and resolved at the police station therefore the complainant's evidence is not credible.**
  - v. **That the conviction was against the weight of the evidence.**
  - v. **That the offence occurred at night and there was a possibility of mistaken identity.**
  - v. **That the age of the complainant was not proved beyond reasonable doubt.**
  - vi. **That the complainant's evidence was not corroborated.**
  - v. **That the prosecution evidence was contradictory.**
  - v. **That the charge sheet was defective.**
  - v. **That the defence case was not considered.**
  - v. **That the Appellant's conviction was based on hearsay evidence.**
  - v. **That the prosecution case was not proved beyond reasonable doubt.**
  - v. **That the burden of proof was shifted to the Appellant.**
  - v. **That the sentence passed was excessive.**
5. The learned counsel for the State conceded to the appeal. It was submitted that the age of the minor was not properly ascertained and that the charge sheet was defective as it did not contain the charging **Clause 8 (1) of the Sexual Offences Act.**
6. This being a first appeal, this court is bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
7. The prosecution case was that on 2/8/2008 at 8.00 p.m, the complainant, PW1 **A M**, a twelve year old standard 4 girl went to the communal bathroom at their plot for a bath. As the complainant was closing the door, the Appellant who was a neighbour at the same plot entered the bathroom from behind her, pushed her and closed the bathroom door. The Appellant held the complainant's mouth and threatened to kill her if she screamed. The Appellant then pulled off the complainant's skirt and pants then removed his shorts and lay on the complainant then proceeded to have sexual intercourse with her.
8. On 6/8/2008 at about 7.30 p.m, the complainant was again in the bathroom taking a bath. The Appellant pushed the bathroom door open and once again proceeded to have sex with the complainant while threatening to kill her. The complainant kept her ordeal to herself until when she heard that the Appellant had gone on safari. The complainant then disclosed to her sister, PW3 **S M** what had happened. The sister revealed the same to their mother, PW4 **A M**. The mother reported the matter to the police. The complainant was issued with a P3 form and escorted to hospital. The doctor confirmed that the complainant had been defiled. After investigations the Appellant was charged.
9. In his defence, the Appellant stated that he had a love affair with **S** (PW3) who was the complainant's sister. The Appellant further testified that the plot where he was staying was big and had over sixty (60) rooms and about two hundred (200) people including the complainant's family lived there. That **S** (PW3) wanted to get married to him but the Appellant was not for the idea and he was eventually summoned home by his father who he had told what was going on.
10. The Appellant stayed home for five months during which period he was recruited to the **National Youth Service** and also learnt that **S** had gotten married. The Appellant then decided to go back to the aforesaid plot to get some work and make money for shopping before reporting to National Youth Service. The Appellant later reported to the **National Youth Service** at **Gilgil** but was arrested six days later by police officers who were in the company of the complainant's mother and her son. The Appellant was placed in custody without knowing the reasons for his arrest. The Appellant denied the offence.
11. The complainant (PW1) gave a detailed account of evidence that establishes that the complainant had sexual intercourse with her. The complainant's evidence is that she had lit a candle in the bathroom which she described in her evidence as **"enough light to see accused."** It was also the complainant's evidence that she had lived at the same plot with the Appellant and knew him by

- the name **Somo** and also knew his voice. The complainant gave a candid account of her encounter with the Appellant which left no doubt that the Appellant had sexual intercourse with her. From the complainant's evidence, I am satisfied that there was sufficient light and she recognized the Appellant. According to the complainant, the Appellant held her on the mouth and threatened to kill her. That the Appellant repeated the same scenario four days later while the complainant was again in the bathroom. For the avoidance of doubt, the complainant stated that the Appellant "**put his penis in my vagina and pushed it inside and kept on doing that for some time...**"
12. The complainant was examined and treated by PW1 **Dr. Titus Ndeti** whose evidence confirmed that the complainant's hymen had been penetrated and her private parts bruised.
  13. The complainant's sister and mother PW3 & PW4 gave evidence that shows the consistency between the evidence adduced by the complainant in court and what she revealed to her family. The evidence of the sister and the mother also corroborated the complainant's evidence that the Appellant was a neighbour at the same plot and that they all shared the same communal bathroom.
  14. The defence by the Appellant dwells mostly on his relationship with S (PW3). The same applies to the evidence of DW1 **Ali Hassann Pantor** and DW2 **George Gikonje**. DW1 blamed this case on the bad blood between complainants family which he stated arose after the Appellant refused to marry S. The Appellants cross-examination of the complainant (PW1) S the sister (PW3) and the mother (PW4) also raised the issue of the relationship with S. From her answers, the complainant was not aware of any such relationship. S PW3 denied having had any affair with the Appellant or having bribed the doctor who examined the complainant. The mother (PW4) denied any knowledge of a relationship between the Appellant and S. The complainant and mother maintained their evidence during the further cross-examination by the complainant after the case was taken out by a different magistrate under the provisions of **section 200 (3)** of the **Criminal Procedure Code**.
  15. The trial magistrate had the benefit of observing the demeanour of the witnesses. After evaluating the entire evidence on record, I am satisfied that the trial magistrate did not err in believing the complainant's evidence. The defence raised by the Appellant did not take any reasonable doubts on the strong prosecution case. The defence of alibi referred by the defence submissions did not dislodge the prosecution case.
  16. The complainant's evidence was that she was 12 years old. The Investigating Officer, PW5 **Sgt. Elizabeth** stated that the complainant's age was 14 years. The complainants mother PW4 and sister (PW3) did not give the complainant's age. No documents e.g. age assessment report, or postnatal clinic card were produced. The doctor who filed the P3 form failed to state the age of the complainant. The P3 form was produced by the Investigating Officer, PW5 **Sgt. Elizabeth**. It is not clear from the record if **section 77 (3)** of the **Evidence Act** was complied with to give the Appellant a chance to cross-examine on the document.
  17. The offence of defilement turns on the question of age. Without any ascertainment of the complainant's age, the offence of defilement cannot stand. However, the offence of sexual assault contrary to **section 5 (1) (b)** as read with **section 5 (2)** of the **Sexual Offences Act** has been proved by the evidence on record. The evidence of the complainant required no corroboration provided that the trial court was satisfied that the complainant was telling the truth (**Section 124 Evidence Act**). The only gap in the prosecution case is the complainant's unascertained age. However, under **Section 179** of the **Criminal Procedure Code**:-

**“When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”**

18. I am satisfied that the evidence on record establish the minor offence of sexual assault as provided for by **section 5 (1) (b)** as read with **section 5 (2)** of the **Sexual Offences Act** which provides for a sentence of not less than ten years whereas **section (3)** of the **Sexual Offences Act** which the Appellant was charged with provides for imprisonment for a term of not less than 20 years.
19. One of the issues raised is that the charge sheet was defective due to failure to state **section 8 (1)** of the **Sexual Offences Act** which creates the offence of defilement. The charge sheet reflects that the Appellant was charged under **section 8 (3)** of the **Sexual Offences Act** which provides for the offence of defilement of a child between twelve and fifteen years. No prejudice was

occasioned by the failure to indicate section 8 (1) of the Sexual Offences Act and **section 382** of the **Criminal Procedure Code** cures such an omission or error.

20. A perusal of the court record shows that this case was initially heard by **J. Oseko Principal Magistrate** who took the evidence of the first four witnesses. Although the defence has complained that they were denied a chance to have witnesses recalled, the record shows that **E. Nderitu** Resident Magistrate who took over the case complied with the provisions of **section 200 (3)** of the **Criminal Procedure Code** and the complainant (PW1) and her mother (PW4) were recalled for further cross-examination as per the request by the defence.

21. The defence raised the issue that the trial court did not carry out a *voire dire* before the complainant testified. The trial magistrate erred by merely recording that she had examined the complainant and found her intelligent enough and that she understood the meaning of oath. As was held in **Kibageny –vs- Republic (1959) EA 92:-**

**“It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.”**

22. **Section 19 (1)** of the **Oaths and Statutory Declarations Act** requires that a *voire dire* be conducted by a trial court to justify the reception of evidence of a child of tender years. The complainant had given her age to the court as 12 years old. It was therefore unnecessary to conduct a *voire dire* in view of the provision of section 2 of the Children’s Act which defines a child of tender years as a child under the age of ten years. (See **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).

23. Finally, the sentence provided for under section **5 (1) (b)** of Sexual Offences Act is imprisonment for a term not less than a sentence of ten (10) years. However, having found the Appellant was guilty of the offence of Sexual assault contrary to **section 5 (1) (b)** instead of the offence of defilement in both count I & II, I substitute the sentence meted out by the trial court with a sentence of ten (10) years imprisonment in each count. Sentence to run concurrently.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 26<sup>th</sup> day of March 2014.**

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**B. THURANIRA JADEN**

**JUDGE**