REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 453 OF 2010

(From the original Conviction and Sentence in the Criminal Case No. 575/2009 of the Senior Resident Magistrate's Court at Taveta: C N. Ndegwa – SRM)

S J M…..………..…………………APPELLANT

VERSUS

REPUBLIC……………………………………..……..……..RESPONDENT

JUDGMENT

The appellant herein **S J M** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The appellant was first arraigned in court on 3rd December, 2009 on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) as read with SECTION 8(2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that:

> **"On the 25th day of November, 2009 at about 13.00 hours at [Particular withheld] area in Taveta District within Coast Province had unlawful carnal knowledge of one M S a girl under the age of 11 years."**

In addition the appellant faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT**. The appellant entered a plea of *'Not Guilty'* to both charges and his trial commenced on 8th February, 2010. The prosecution led by **CHIEF INSPECTOR ONGERI** called a total of five (5) witnesses in support of their case. **PW1** the complainant who was a minor aged 6 years told the court that on 25th November, 2009 at about 1.00 p.m. she was at the family home in [Particulars withheld] village. The appellant who was her father called her to bring him water to drink. She did so. The appellant then pounced on her and removed her pant. He applied oil on her private parts and then raped her. **PW1** called out for help and her 16 year old brother **M S PW3** came to her rescue. The children then waited for their mother to return home in the evening and reported the incident to her. The mother **M K PW2** took the complainant to Taveta police station to report the assault. She was then taken to hospital where she was admitted for five (5) days. Upon completion of police investigations the appellant was arrested and charged with the present offence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn statement in which he denied having defiled his daughter. On 29th July, 2010 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of Defilement and sentenced him to serve thirty (30) years imprisonment. Being aggrieved

by both his conviction and sentence the appellant filed this appeal.

The appellant who was not represented during the hearing of his appeal chose to rely on his written submissions which had been duly filed in court. **MR. GIOCHE** learned state counsel made oral submissions opposing the appeal.

I have perused the written submissions filed by the appellant on which he raises the following grounds of appeal:

- Defective charge sheet
- Failure to conduct a *voire dire* examination
- Insufficiency of evidence
- Failure to consider defence
- Failure to comply with section 169 of the Criminal Procedure Code

On the first ground the appellant submits that in view of the father/child relationship between himself and the complainant he ought to have been charged with the offence of *'Incest'* as opposed to *'Defilement'*. The decision of what charge of lay rests exclusively with the Deputy Public Prosecutor. It is not for an accused to **suggest** what he ought to be charged with. The fact that he was not charged with Incest does not render the present charge of Defilement defective. The only relevant consideration is whether the offence can be proved by evidence. The charge as framed is perfectly in order and I therefore dismiss this ground of the appeal.

The second ground of appeal is that the trial magistrate failed to conduct a *voire dire* examination. A perusal of the record shows this to be a misrepresentation. The complainant told the court that she was six (6) years old. At page 3 of the record it is clear that the learned trial magistrate did comply with the law and did conduct a *voire dire* examination in order to assess whether or not the child would give sworn evidence. At page 3 line 25 the record states:

> **"<u>PW1</u> (minor aged 6 years) voire dire examination by the court."**

On the same page at line 30 having conducted the *voire dire* examination the court concludes as follows:

> **"Court – The witness understands that she has to tell the truth after swearing. The witness to give sworn evidence."**

The complainant then proceeded to give a sworn testimony and the appellant did cross-examine her. Thus this ground of the appeal has no basis and the same is hereby dismissed.

The appellant then goes on to submit that the evidence adduced by the prosecution was not sufficient to warrant his conviction. I will now proceed to re-consider and re-examine the evidence on record. **PW1 M S** the complainant was a minor. She told the court that she was 6 years old. The P3 form produced by the doctor who was a clinical officer and was qualified to determine the complainant's age also gave her age as 6 years old. Thus the complainant was clearly a minor and her age brought the incident under the ambit of section 8(3) of the Sexual Offences Act. The complainant told the court that on the material day at 1.00 p.m. she was at home with her brother and the appellant who is her father. In his defence the appellant concedes that the complainant was his child. **PW1** goes on to narrate how the appellant called her to bring him drinking water. She did so. **PW1** then states at page 4 line 9:

> **"After that he removed my underpant when I was on the bed. He applied oil on my private parts. He then removed his trousers and did bad manners to me. He inserted his private part into my private parts after separating my legs. It was painful. I cried and my brother M S came. Accused release me …………"**

The complainant has given a very detailed account of what transpired. The incident occurred at 1.00 p.m. It was broad day light and visibility was optimal. The appellant being the complainant's father was very

well known to her. She was able to see and recognize him in view of the close proximity this type of offence entails. I find there was no possibility of a mistaken identity. The complainant though a minor gave her evidence in a clear and consistent manner. She remained unshaken under cross-examination by the appellant. Question may be raised due to the statement by **PW1** that her mother told her what to come and say in court. There could be the fear that the child had been coached to implicate the appellant. However, under re-examination the child clarified that she had been told by her mother to come and say in court what happened i.e. to narrate the events of the day. In addition **PW3** the eyewitness and **PW4** the doctor both gave independent and reliable evidence which corroborated the testimony of **PW1**. Thus this removed fear that **PW1** had been coached at all.

The complainant's evidence was duly corroborated by the testimony of her brother **PW3 M S**. **PW3** was a 16 year old boy and told the court that he was at home on the material date. He confirms that the appellant who was his father called **PW1** to bring him water. **PW1** overstayed inside the house and **PW3** heard her crying. He went to check and found the appellant in the very act of defiling his younger sister. In his evidence at page 6 line 5 **PW3** states:

> **"After a while I heard her [complainant] crying and I went to check what was happening. I found my father and M on the bed in my father's bedroom. My father had lowered his trousers to the feet and lifted M's dress to her waist. My father was f****ing M. He was inserting his penis into her vagina. When accused saw me he panicked and released M."**

Despite the socially unacceptable language used in the record this provides a very graphic account of what **PW3** saw. As stated earlier he caught the appellant in the very act of defiling **PW1**. As stated before it was 1.00 p.m. broad daylight. The appellant was well known to **PW3** as his father. There could be no possibility of a mistaken identity. **PW1** and **PW3** were the appellant's own children – his own flesh and blood. They could have had no possible motive for them to lie against him (nor has any such motive been alleged).

PW2 the Children's mother testified that when she arrived home at 6.00 p.m. she was told of the incident. Both children named the appellant their father as the perpetrator. **PW2** checked the complainant's private parts and found seminal fluid. She immediately went to report to police and took **PW1** to hospital.

Further corroborative evidence is provided by the testimony of **PW4 DR. DIANGA ODEP** a medical officer attached to Taveta District Hospital. He examined the complainant the same day at 10.40 p.m. His findings were stated as follows on page 9 line 7 of the record:

> **"On the private parts the external genetalia was swollen. The labia majora was inflated and reddish. It also had bruises. The vaginal walls had lacerations and cuts. The lacerations and cuts were bleeding. The hymen was missing. There was a whitish slimy discharge from the vagina. There were also blood stains around the vulva ………"**

PW4 filled and signed the P3 form with a finding that the child had been defiled causing her grievous bodily harm. Indeed the assault was so viscous that it necessitated the admission of the complainant into hospital where she underwent treatment for five days. From this – the broken hymen, the injuries and swelling of vagina, presence of seminal fluid can lead to only one conclusion in a six year old child – that she had been defiled.

Therefore the evidence as presented was overwhelming. There was proof that the child had been defiled and there was proof that the appellant was the perpetrator. Indeed my own assessment is that the evidence was watertight.

The appellant submitted that the trial magistrate failed to consider his defence and mitigation. This is not borne out by the record. The accused in his defence had claimed that the charge was a result of a quarrel he had with his wife three days previously. In the judgment at page 2 line 14, the trial magistrate states as follows:

"I do not believe that the accused has been implicated in the case falsely as he alleged in his defence because when the incident occurred the mother to PW1 and PW3 was not even there to influence them in any way. The quarrels the accused may have had with his wife PW2 have no bearing in this case………"

It is clear that the trial magistrate did give due consideration to the appellant's defence but correctly dismissed the same. Likewise the record is clear that appellant was accorded an opportunity to mitigate and did so.

Finally appellant claims that the trial magistrate failed to comply with section 169 of the Criminal Procedure Code in that he did not indicate for which between the main charge and the alterative charge he had rendered the conviction. Section 169(2) of t he Criminal Procedure Code provides as follows:

"(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law which, the accused person's convicted, and the punishment to which he is sentenced."

At page 1 of the judgment in paragraph (1) the charges faced by the appellant as well as the relevant sections of law have been cited as follows:

"The accused is charged in the main count with defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. He also faces the alternative the count of indecent assault of a female contrary to section 11(1) of the same Act …….."

Nothing could be clearer than this. At page 2 line 18 of the judgment the trial magistrate concludes this:

"…… and it is my conclusion that the accused is the one who defiled the complainant on 25th November, 2009. I therefore find him guilty as charged and convict him accordingly."

It is clear from this that the guilty verdict was rendered in respect to the charge of defilement which was the main charge. There is no ambiguity here. Thus I am satisfied that the judgment did fully comply with the provisions of section 169(2) of the Criminal Procedure Code. I am satisfied that the conviction of the appellant was merited given the weight of evidence adduced. I therefore confirm that conviction and dismiss his appeal against conviction.

After listening to mitigation the trial magistrate proceeded to sentence the appellant to thirty (30) years imprisonment. Section 8(2) of the Sexual Offences Act under which the appellant was convicted provides:

"(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

The use of the word shall makes this a mandatory sentence. The trial magistrate therefore having rendered a conviction had no discretion regarding sentence. The thirty (30) years term is unlawful and thus cannot be upheld. As such I set aside the thirty (30) year term and impose the lawful mandatory sentence for this offence being life imprisonment. Finally, this appeal fails in its entirety and is hereby dismissed.

Dated and delivered in Mombasa this 4th day of February, 2014.

M. ODERO

JUDGE