



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Criminal Appeal 83 of 2011**

**STEPHEN NGANGA KAMAU.....APPELLANT  
VERSUS  
REPUBLIC.....RESPONDENT  
JUDGMENT**

Stephen Nganga Kamau, the appellant, is aggrieved by the conviction and sentence in Naivasha Senior Principal Magistrate, Mrs Wamae, in Criminal Case No. 2988/2010. The appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. It was alleged that on 8/11/2010 at Naishavsha caused his genital organ to penetrate the genital organ of S. M. M, a child aged 9 years. In the alternative, he was charged with the offence if indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. After the trial, the appellant was convicted and sentenced to serve 30 years in jail. He has appealed. The appeal is predicated on grounds found in the petition of appeal and supplementary grounds of appeal which are as follows:-

- 1. That the conviction was based on insufficient and contradictory evidence;**
- 2. That the court relied on the evidence of PW2, a single identifying witness without warning itself of the dangers;**
- 3. That the court did not consider the appellant's defence;**
- 4. That the sentence was harsh and excessive.**

The appellant therefore prays that the appeal be allowed, conviction be quashed and sentence be set aside. The appellant was represented by Mr. Koech Advocate. Mr. Marete, Learned Counsel for the State opposed the appeal. He said that there was sufficient evidence on record to prove the appellant's guilt; that the complainant knew the appellant as her uncle Steve; that he had defiled her there before and the Doctor confirmed that the complainant had been defiled. Counsel further urged that the appellant did not raise any defence save for how he was arrested. On sentence, he submitted that under **Section 8(2)** of the **Sexual Offences Act** the prescribed sentence is life imprisonment and 30 years was not harsh. He urged the court to uphold the conviction and sentence. The complainant, is S.M. M (PW2). Upon a *viore dire* examination being conducted by the court, PW2 was found not to understand the meaning of an oath and therefore gave unsworn evidence. She was, however, subjected to cross examination, although she should not have been.

PW2 told the court that she was 8 years old but Dr. Etole who examined the complainant on 9/11/2010 said that she was 10 years. In the P3 form that was filled by the Doctor, he indicated that the complainant was 8 years. PW5, Cpl Cherono produced the clinic card in respect of the complainant as PEx.2 and it indicates that the complainant was born on 25/2/01. In the year 2010, she was 9 years. The charge sheet does indicate that the age of the complainant to be 9 years. In sexual offences, the age of the complainant

is very material because it determines the sentence to be meted on the accused in the event of a conviction. **Section 8(2)** prescribes the sentence for an offence under **Section 8(1)** of the **Sexual Offences Act**. If the complainant is eleven years and below the only sentence upon conviction is life imprisonment. I believe that PW4 merely followed what the complainant told him and made an estimate of 8 years which is not a major variance from 9 years. The charge was supported by the evidence of PW3 who produced the clinic card which was issued at the complainant's birth and which must show the correct date of birth. The variance in the age of 8 and 9 years is not material as to vitiate the conviction or cause any injustice to the appellant. Besides 8 or 9 years still falls within the bracket of the sentence under **Section 8(2)** of the **Sexual Offences Act**. In my view, the contradiction in the age of the complainant is not so material as to have an effect on the conviction.

The complainant is a child of tender age. She gave unworn evidence. Under **Section 124** of the **Evidence Act**, the proviso thereto, the court can base a conviction on the uncorroborated evidence of a minor provided that for reasons recorded, the court is satisfied that the child is talking the truth. **Section 124** provides:-

**“S.124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall received the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

Most sexual offences are committed in secret or out of sight and it would be impossible to prove any, if the law did not take cognisance of that fact. In this case, it is worth noting that even though the appellant was given a chance to cross examine the complainant, he only asked one question and did not challenge all what the complainant had told the court. PW2 was alone when the incident occurred. She knew the appellant as her uncle “Steve” and it has not been disputed that he was the one. The appellant was a person who was well known to the complainant as a cousin to her father. The offence was committed during the day. She identified him by name. He owned a “Kinyozi” barber shop where he committed the offence. Indeed the appellant admitted that he operates a barber shop. PW2 vividly explained what happened to her. Although the complainant did not specify the time of the offence, she clearly stated that it is when she was going home from school. PW1 said that PW2 used to leave school at 4.30 p.m. The incident must have taken place sometime after 4.30 p.m. The trial court was satisfied that the complainant told the court the truth. Indeed there was no reason for the complainant, a child of tender years, to frame the appellant with such a serious offence. There was no grudge between her or her family and that of the appellant nor was any alleged. The complainant was a truthful and candid witness. There is no doubt that the complainant was defiled. It is PW1, Irine Mijide, the complainant's teacher who first found out that the complainant, had been defiled. PW1 enquired from PW2 what had happened to her and she said that it is Steve who defiled her. She inspected the child and found her to have a whitish discharge. Upon examination by PW4, he found that she had a broken hymen, labia majora was swollen and she had pus cells. There was evidence of penetration. I am satisfied beyond any doubt that it is the appellant who committed the offence.

The appellant's defence was a mere denial. He stated that he operates a barber shop, talked about his arrest and denied committing the offence. He did not offer any explanation as to why PW2 would have lied. I am satisfied that the appellant committed the offence, and was properly convicted. Whether the sentence was excessive; **Section 8(2)** of the **Sexual Offences Act** prescribes a sentence of life imprisonment if found guilty of an offence of defilement. The appellant was only sentenced to 30 years and in any view that is an illegal sentence. The **Sexual Offences Act** is a statute of strict application. Sentencing is a discretion of the court and it must be exercised within the law. In this case, the law (S.8(2) Sexual Offences Act) is that the sentence to be meted upon conviction is life imprisonment.

As required of this court, I have re-evaluated the evidence which was adduced before the trial court afresh and made my own findings. In the end, I dismiss the appeal on conviction. I set aside the sentence of 30 years and instead substitute it with a sentence of life imprisonment. It is so ordered.

**DATED and DELIVERED this 28<sup>th</sup> day of March, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

The appellant present - in person

Mr. Chirchir for the Respondent

Kennedy – Court Clerk