**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL APPEAL NO. 66 OF 2010**

**SAFARI CHARO KOYO ….....ACCUSED**

**VERSUS**

**REPUBLIC ….....PROSECUTOR**

***(From the original conviction and sentence in criminal case no. 121 of 2010 the Chief Magistrate's Court at Malindi before Hon. D. W. Nyambu – PM)***

**JUDGMENT**

1. The accused was charged before the Chief Magistrate's Court Malindi with two counts, namely, Defilement contrary to Section 8(3) of the Sexual Offences Act and in Count 2 with Induced Indecent Act contrary to Section 6(9) of the Sexual Offences Act. The particulars are set out in the charge sheet.

2. At the conclusion of the trial, the Appellant was convicted and sentenced to 20 years imprisonment. He has now appealed to this court against both conviction and sentence. Through his counsel, Mr. Muranje, the Appellant filed seven amended grounds of appeal. Grounds 1-6 challenge the quality of evidence upon which the conviction was based. The final ground relates to sentence.

3. The grounds are as follows:

**"1. The learned trial magistrate erred in law and fact by convicting the appellant on the basis of evidence that was at variance with the particulars in the charge sheet and evidence that was far fetched, inconsistent and contradictory in material aspects.**

2. **The learned trial magistrate erred in law and fact by failing to consider the identification of the alleged assailant was not absolute and that the same was open to error as it was based on alleged information from material witnesses who were never called to testify.**

3. **The finding that defilement was established was erroenous in law and fact as the medical evidence in that regard was not conclusive granted as the material witness stated so; medical treatment notes were not produced nor neither were they used as a basis for the filing of the P3 form.**

4. **The entire investigation of the case was not properly conducted as to grant any reasonable basis for the prosecution of the Appellant leading to a miscarriage of justice thereby.**

5. **The evidence presented by the prosecution does not prove the offence that the appellant was conflicted of as required by law and in the absence of proven age of the complainant the conviction and sentence have no basis at all in law and the learned magistrate trial magistrate erred in law and fact thereby.**

6. **The learned trial magistrate erred in law and fact by failing to properly consider the defence of the appellant and the fact that his conduct after the alleged incident was inconsistence with that of a guilty person.**

7. **The sentence of 20 years imprisonment imposed upon the appellant is manifestly excessive and contrary to law thereby."**

The appeal was opposed by the State. Both parties filed written submissions in respect of the appeal.

4. The basic facts of the prosecution case were that P.K. was 13 years old in 2006, residing at Ganda with her mother and father (PW2 and PW3 respectively). She was a student at [Particulars Withheld] Primary School. On 13th October, 2006 she left school in the company of other students to go home for lunch. She parted with her colleagues at a junction to take a path to her home. The path was secluded and as she walked on, she met with the Appellant, a local person known to her. At knife point he carried her into an isolated part of the surrounding bush. He threatened to harm her if she raised an alarm. He trussed her hands and gagged her mouth after planting her on a tree stump.

5. He then cut off her uniform and panty using the knife, before defiling her. The complainant sustained a cut on the back from the tree stump and knife stabs inflicted on her legs by the appellant after the defilement. She was bleeding from her private parts. Thereafter the appellant rode off on his bicycle. The complainant walked home and immediately reported to her mother who was at home and later her father. The local chief and police were notified. A P3 form was issued to the minor. She was treated at the Malindi District hospital. Eventually, the accused was arrested and charged.

6. The accused in his defence gave a sworn statement calling one witness. He stated that he was a mason and a resident of Ganda. That on the material date he was at work at a place called Mayungu, between 8.00am and 4.00pm. On returning home that evening he found a letter summoning him to the chief's office. On presenting himself the next day, he was handed over to police on allegations of defiling PW1, which he denied. His witness was Ziro Nyange (DW2) also a resident of Ganda and who was allegedly working at Mayungu with the appellant on the material date. He said that the appellant was on duty from morning to 4.00pm.

7. As a first appeal court, this court is obligated to re-assess the evidence of the trial and make its own findings even while bearing in mind that the Lower Court had the advantage of observing and hearing the witnesses **(Okeno v Republic 1973 EA 322)**. The main questions raised in this appeal relate to the identity of the assailant, the age of the complainant and the question of penetration.

8. The judgment of the learned trial magistrate shows that she analysed the evidence in some detail. On the first issue, the Lower Court noted:

> **"She (complainant) stated that she was accosted by the accused whom she knew physically. She narrated step by step the entire incidence (sic) from the removal of clothes, cutting of clothes by accused person and threats issued before and after the act. She even described the dressing of the accused person …."**

9. The offence occurred in day time and on the face of it took some time, sufficient enough for PW1

to observe her attacker. On arrival home, the complainant named her attacker to her parents. This immediacy is confirmed by the Appellant himself who states that the chief summons were waiting for him when he got home that evening. This was evidence of recognition as opposed to identification of a stranger (see **Anjononi v R 1980 KLR 59**). The Appellant suggested that because he was previously married to PW2's sister but got estranged, he may have been framed. The trial magistrate considered and rightly dismissed the suggestion as an afterthought. She also thought the alibi was an afterthought which appears to be the case as it was not put up early at the trial (see **Karanja v Republic [1983] KLR**.

10. That notwithstanding, PW1 testified that the appellant rode away from the scene on a bicycle towards the main road. Thus it cannot be said, considering the distance between Mayungu and Ganda that the appellant could not have traveled there on a break. Besides his witness DW2 could not confirmation of the appellant remained at the working site all the time that day. If PW2 had any grudge with the appellant it is hard to see how that transferred to the minor who clearly had suffered some trauma on the material date.

11. From the evidence of PW1 and PW2 the complainant arrived home in a mess. Not only had her uniform and panty been cut with a sharp object, she had bruises (confirmed by medical evidence) and her hymen was rugged. In addition ten days later on examination by the doctor she had a foul smelling discharge suggestive of a sexually transmitted disease (STI). These damages and injuries cannot have been self inflicted by the complainant in order to fix the appellant. The degree of penetration matters not. The P3 form shows that the hymen was rugged and there was possible STI. Under the Sexual Offences act penetration is defined as:

> **"The partial or complete insertion of the genital organs of a person into the genital organs of another person."**

PW1 asserted, and the court rightly found that penetration did occur. I think that the questions of the identity of the assailant and penetration were well considered and proper findings reached.

12. In my considered opinion, it is the issue of the age of the complainant that presents some difficulty. PW1 said she was 16 at the time she testified and therefore 14 at the time of assault in 2006. PW2 also gave similar details but none of the two gave the year of birth. PW3 however, said the complainant was born in 1993 and was therefore 14 years at the time of the trial. The age of PW1 in 2006 should therefore have been 13 according to PW3. Hence it seems that the age of the complainant was between 13 or 14 in 2006, according to her and her parents. No records of birth were tendered. However, the P3 form gave PW1's estimated age at 13 years. This issue has been taken up in earnest by the defence. Other subsequent submissions on the need for corroboration appear to be out of tune with Section 124 of the Evidence Act (as amended).

13. Perhaps because counsel for the appellant relied on authorities decided before the passage of the Sexual Offences Act and amendments to Section 124 of the Evidence Act. The court grappled with the evidence of the age of the complainant and concluded: "I find that it has been proven that she was 13 years old and child within the meaning of the Children's Act."

14. It is probably a justifiable criticism of the trial court that it did not adopt a clinical approach to the question of proof of age. There are many authorities to the effect that age must be proven by medical evidence. In this case the prosecution relied on the evidence of PW1-PW3 and the P3 form with regard to the victim's age.
15. Was it open to the court to dismiss peremptorily the age assessment done by the doctor who completed the P3 form? The evidence approximates to the age given by the parents of the victim and the victim herself. The mere fact that magic words "age assessment form" do not appear on the P3 form cannot be good reason to dismiss such assessment done by a qualified doctor. It is also a fact that medical evidence including medical age assessments, based on dental x-ray films are just that.

16. While the best evidence in this regard ought to be such scientific medical assessment and/or certificates or both, I think that in respect of obvious minors, too rigid an approach could lead to miscarriage of justice. And possibly a situation where the provisions of Section 124 of the Evidence Act lose meaning. Yet these provisions were designed with the very specific intent of safeguarding the constitutional protections to children and the vulnerable.

Section 124 does not distinguish between the nature of evidence contemplated, whether on age, the sexual attack, etc.

17. In the present case the trial magistrate clearly believed the evidence of PW1 and gave sound reasons for her belief. She also called to aid the provisions of the Children's Act. The definition of a child under that Act is; “Any human being under the age of eighteen years” - (See also Article 260 of the Constitution). And “age” where actual age is unknown means apparent age. Hence the trial magistrate found it proven that the complainant was 13 years old within the meaning of the Children's Act. This is a clear reference to the apparent age, which is stated in the P3 form as the “Estimated age of person examined” in this case 13 years. I cannot find any reason to fault that logic. At any rate, even if it was to be concluded that the complainant was an adult, there is ample evidence to support a charge of rape as defined under the Sexual Offences Act, against the Appellant.

18. The Appellant in my view was properly convicted and the sentence awarded lawful. The charge of Induced Indecent Act should have been preferred in the alternative as it arose from the same set of facts. Nothing turns on that aspect as the Appellant was acquitted thereon, and there is no evidence that he suffered any prejudice thereby.

The appeal has no merit and is accordingly dismissed.

**Delivered and signed at Malindi this 25th day of November, 2013 in the presence of**

**Court clerk – Samwel**

**C. W. Meoli**

**JUDGE**