REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL No. 276 OF 2009

(From Original Conviction and Sentence in Criminal Case No.534 & 535 of 2008 of the Senior Resident Magistrate's Court

at Mariakani –Andayi W.F, SRM)

KIBWANA MAPEMA.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

KIBWANA MAPEMA (*the appellant*) appeals against conviction and sentence on two counts of Defilement Contrary to Section 8(1) as read with Section 8(2) of The Sexual Offences Act, 2006. On finding him guilty, the Senior Resident Magistrate sitting at Kaloleni sentenced the appellant to a life imprisonment.

The particulars of offence as stated in the charge are-

"Count 1 - On the 7th day of October 2008 at in Kaloleni District within Coast Province, unlawfully and intentionally committed an act which caused penetration of his male organ namely penis into the female genital organ namely vagina of S.M. a child aged 9 years.
Count II – On the 7th day of October 2008 in Kaloleni District within Coast Province, unlawfully and

intentionally committed act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of M.N. a girl aged 10 years."

Although the appellant also faced two alternative charges of committing an indecent act on a child contrary to Section 11(1) to Sexual Offences Act, 2006 no finding was made on this as the trial court had returned a verdict of guilt on the principal offences.

Relying on written submissions, the appellant canvassed four grounds of appeal paraphrased as follows-

(a) The evidence of the minors was uncorroborated and untruthful.

(b) The conviction is unsafe as it was founded on hearsay and insufficient evidence.

(c) The age of the complainants was not proved.

(d) The learned Magistrate failed to consider the appellants defence.

Ms Macharia appeared for the State, opposed the appeal and responded to these grounds.

This court is duty bound to re-evaluate the evidence received by the trial court and to draw its own conclusions. The court is minded that, unlike the trial court, it has not had a first hand account of this evidence.

M.N (PW 1) and S.P (PW2) are the complainants in Count 2 and Count 1 respectively. It was about 4.00pm on 7th November 2008 when the appellant known at the village as Wazimu called M.N to his house. PW1 found him lying on his bed. PW2 wanted to play with PW1 and so looked for her, she found PW1 at the house of the appellant. The appellant offered food to both of them. He then requested PW1 to go out and hang his coat to dry. The appellant remained behind with PW2; he took the opportunity he had created to ask PW2 to remove her panty. She did. He then forced his penis into her but she started to cry due to pain. The appellant withdrew. PW2 then left the room.

All this while, PW1 was outside the door of the room. Although PW1 says that the appellant had locked the door from the inside, PW2 thinks that it is infact PW1 who had done so from the outside. As PW1 left the room PW2 entered. PW1 was now alone in the house with the appellant. The appellant then defiled PW1 by inserting his penis (called 'insect' by PW1) into her vagina and penetrating her. PW3 another minor says that by peeping through a window she earlier seen PW1, PW2 and the appellant inside the house. PW4 Mwangolo Chigulu, a clinic officer at Mariakani District Hospital examined both complainants.

In defence the appellant gave an unsworn statement but did not call any witness. He denied the offence. He does not know why some ten men arrested him and beat him. He told the court that the charges were ill-motived. This line of defence was consistent with the questions he put to PW5 (the mother of PW1) suggesting that PW5 held a grudge against him.

PW1 gave a sworn statement. She was 11 years at the time of testifying and was therefore not a child of tender years (see Definition of 'child of tender years' in Section 2 of The Children Act). PW2 and PW3 were both children under the age of ten years and after the trial court carried out *voir dire* proceedings received their unsworn testimony. So in respect to PW2, the provisions of Section 124 of the Evidence Act would apply, the Section reads as follows-

"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 receive 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."

The learned Magistrate fully appreciated the effect of these provisions in the following statement-

"The evidence of PW2 requires corroboration unless I am satisfied that she was a truthful witness and her evidence is reliable."

On re-evaluating the evidence this court comes to the same conclusion as that of the learned Magistrate that it overwhelmingly implicates the appellant. The account of PW1 and PW2 are corroborative and consistent. This includes how PW2 found PW1 in the house of the appellant. How they were both offered food by the appellant. How the appellant created the opportunity to be alone with PW2. Then there is the evidence of PW3 who saw PW1, PW2 and the appellant together lying on the same mattress. This was before the appellant had asked PW1 to hang out his coat. There is evidence of how, when PW1 was out of the house, PW2 and the appellant were left behind. At this point the appellant asked PW2 to remove her panty and she did. Then in her words-

"He (the accused) then did bad manners to me. He put his insect into mine and slept on me. I told him I was hurting but did not leave till I wanted to cry when he left me."

Although neither PW1 nor PW3 witnessed the offence directly they both gave a corroborative account of how on the day of the offence, PW2 was in the house with the appellant.

As for Count II, PW1 was not a first timer. The evidence of PW2 said this of her-

"M … said she was used to sleeping on the small mattress with the accused after eating."

PW1 encouraged PW2 to lie down on the mattress with the appellant. After the successful liason with PW2, the appellant approached PW1 and had a sexual intercourse with her. PW1 said as follows-

"The bad manners he did was to take his "insect" and put in mine and did the act."

The medical evidence by PW2 confirmed that PW1's hymen was broken and her labia minora bruised, this was consistent with the allegation of defilement.

This court agrees with the finding of the learned Magistrate that-

"The complexity of the story is not such as would be told to young girls PW1 and PW2 and then relate it back with the consistency that they did. I am satisfied that these are honest witnesses and what they said is the truth."

That assessment, if I may add, would extend to PW3.

A more weighty issue taken up by the appellant is that the ages of the victims were not proved. In a charge of defilement prove of age is of utmost importance. Section 8(1) of The Sexual Offences Act

which creates the offence of defilement is clear that the victim must be a child. Under the Children's Act, a child is defined to be a human being under the age of eighteen years. A similar meaning is now assigned to it by Article 260 of The Constitution of Kenya, 2010. Although, generally, it must be established that the victim is under the age of eighteen years her exact age must also be proved as the punishment prescribed in Sections 8(2), 8(3) and 8(4) of The Sexual Offences Act depends on the age of the victim. Just like all ingredients of the offence, the onus is upon the prosecution to prove the age of the child beyond reasonable doubt. There is no judicial unanimity as to how this should be done. There are decisions suggesting that this can be done only through production of a birth certificate, medical age assessment report or other documentary evidence, see-

(a) Hillary Nyongesa –Vs- Republic Eld HCC Appeal No. 123 of 2009 (Justice Mwilu)

(b) Mtawali –Vs- Republic Mbsa Criminal Appeal No. 178 of 2009 (Justice Odero)

Undoubtedly, a medical age assessment provides compelling evidence as to age as it is a scientific result. On the other hand Justice Ouko in **Safuni Manguyu –Vs- Republic Nakuru Criminal Appeal No. 28 of 2010** was on the strong view that age can be proved by other means than documentary evidence. I would associate myself with the latter position not only because I agree with the judges sentiment that ***"a good majority of children victims of Sexual Offences will never get justice as it is common knowledge that such documents are not generally available to the rural or even urban families***" but also because there should be no reason to doubt the accuracy of cogent and credible evidence of a person or persons who would know the age of the victim. This may include the victim herself or her parents. The evidence must, of course, be strong enough to meet the threshold of proof required under criminal law.

This court has found it necessary to discuss this aspect of age as there was only oral evidence as to the age of the victims. PW1 testified on 18th December 2008 and said that she was 11 years at the date she was testifying. She did not know the date of her birth but stated that it is her mother who advised her about her age. PW1's mother was however not called to testify. It seems to me that it was critical for the mother to confirm the age of her child, the absence of which makes the evidence of PW2 age tenous. The appellant must benefit from this insufficiency.

Then there is PW2, the victim in Count 1. She gave unsworn evidence on 23rd February 2009 in which she gave her age as nine years and in class 3. Her mother PW5 confirmed this age. Her evidence was not discredited. This is consistent with the age told to PW4 the medical officer who completed the P3 form. Taken together there was sufficient ground for the trial court to hold that the victim was 9 years of age at the time of the crime.

On the analysis of the law and the evidence we allow the appeal in respect to Count 2. The age of the victim was not proved as required by law and there is no telling, with certainty, that she was a child.

In respect to Count I, there is proof that the victim was 9 years at the time of the offence and that there was partial insertion of the appellant's genital organ into her genital organ. Although the partial insertion did not cause the victims hymen to break it was nevertheless penetration as defined thus by Section 3 of The Sexual Offences Act-

"'Penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

For these reasons this court upholds the conviction and sentence.

The result is as follows-

(1) The appeal in respect to Count 1 is hereby dismissed and the conviction and sentence upheld.

(2) The appeal in respect to Count 2 is hereby allowed, the conviction is quashed and the sentence set aside.

Those are my orders.

Dated and delivered at Mombasa this 16th day of February, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-
Jamii for state
Appellant in person
Court clerk - Moriasi