MARTIN NYONGESA WANYONYI...APPELLANT.

VERSUS

REPUBLIC...RESPONDENT.

(***Being an appeal from the original conviction and sentence of M.N. Gicheru – CM. in Criminal Case No. 3779 of 2009 delivered on 22nd July, 2010 at Kitale***)

JUDGMENT.

The appellant, Martin Nyongesa Wanyonyi, appeared before the chief Magistrate at Kitale charged with the offence of defilement contrary to section 8 (1) read with section 8 (3) of the Sexual Offences Act, in that on diverse dates between the 14th October, 2009 and the 6th November, 2009 at in Uasin Gishu West District, unlawfully and intentionally caused penetration of his genital organ into the genital organ of Z.N, a child aged 12 years. Alternatively, the appellant faced a charge of Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act, in that on diverse dates between the 14th October, 2009 and the 6th November, 2009 at in Uasin Gishu West district, unlawfully caused contact between his genital organ and the genital organ of Z.N, A child aged 12 years.

On pleading not guilty to both counts, the appellant was tried, convicted and sentenced to serve twenty (20) years imprisonment on the main count.

Being dissatisfied with the conviction and sentence, the appellant preferred seven (7) grounds of appeal contained in the petitions of appeal filed herein on the 28th July, 2010. The grounds were argued on his behalf by the learned counsel, **Mr. J.M. Wafula**.

In his submission, the learned counsel concentrated on grounds three (3) and eight (8) of the petition.

Ground three (3) is that the lower court erred in law and fact by not have given a fair trial to the appellant in that the court amended the age of the complainant at the time of judgment and infringed section 214 (1) of the Criminal Procedure code since the appellant was not given the opportunity to plead to the amended age of the complainant. This ground is found in the petition of appeal filed by the learned counsel. There are two petitions filed by the appellant on the same date. One was filed by the appellant in person and contains fifteen (15) grounds while the other was filed by the appellant's counsel containing twelve (12) grounds.

It would appear that the petition relied upon by the appellant is that which was filed by his counsel. Ground eight (8) of the said petition is that the lower court erred in law and fact to have convicted the appellant when the prosecution did not explain why they detained him in custody for more than twenty four (24) hours before taking him to court thereby breaching section 72 (3) of Then Constitution of Kenya.

On ground three (3), learned counsel submitted that the appellant was not accorded a fair trial in that the age of the complainant was amended by the court at the time of its judgment contrary to the provisions of section 214 of the CPC.

Learned counsel contended that the appellant ought to have been given an opportunity to reply to the amended charge and perhaps re-call witness.

The learned counsel submitted that the judgment of the court placed the age of the complainant to be more than fifteen (15) years whereas the complainant (PW1) said that she was 15 years old while the clinical officer (PW3) said that she was 12 years old and PW4 said that she was 16 years old. Against all that background, the charge sheet indicated that the complainant was twelve (12) years old.

Relying on the decision in the case of **Jon Cardon Wagner vs. Republic (2010) e KLR**, the appellant's learned counsel contended that there was a breach of justice in the appellant's trial.

On ground eight (8), the learned counsel relied on the decision in the case of **Githuku vs. Republic (2007) 1 EA 83** and contended that the appellant's constitutional rights under section 72 (3) of the Old constitution were breached in that he was held in police custody without explanation for a period of four (4) days prior to being taken to court.

For all the foregoing reasons, learned counsel urged this court to allow the appeal by quashing the appellant's conviction and setting aside the sentence imposed by the trial court.

On behalf of the State respondent, the learned prosecution counsel, **M/s. Bartoo**, conceded the appeal on the basis that the evidence of the complainant (PW1) indicated that she was not defiled. She (PW1) merely stated that the appellant took her to a relative's house in Eldoret but did not disclose whether there was sexual contact between them. The learned prosecution counsel contended that the appellant ought to have been charged with the offence of wrongful detention.

On the amendment of the charge by the trial court, the learned prosecution counsel submitted that this amounted to mistrial since the charge was amended without the appellant being given an opportunity to answer to the amended charge.

On the alleged violation of the appellant's constitutional rights, the learned prosecution counsel submitted that the issue ought to have been raised earlier at the right forum.

Having heard both sides and notwithstanding the concession of the appeal by the state respondent, the primary obligation of this court is to reconsider the evidence and draw its own conclusion's bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see **Okeno vs. Republic (1972) EA 32).**

The prosecution case was based on the evidence of five (5) witnesses who included the complainant. **Z.N (PW1**), a pupil at a primary school who indicated that she was aged 15 years old. She said that she was at a funeral gathering where the appellant found and asked her to accompany him at his sister's house to spend the night and be taken to her home on the following day. She accompanied him to the said house and spent the night but the appellant left her there and went away. He resumed after a week and pretended to take her to her auntie's place in Eldoret but instead took her to the house of his brother at Kipkaren. Later, he was arrested by the police for taking and leaving her at Eldoret where they had slept together. She was taken by her grandmother to Kitale District Hospital where she was examined.

The complainant's mother **C.W(PW2)** was informed on the 17th October, 2009 that the complainant had gone for a funeral on 13th October, 2009 but had not returned home. The matter was reported to the police. Later, the appellant was arrested after being suspected of having abducted the complainant who was found at a place called Kamukunji in Eldoret which was pointed out by the appellant.

The complainant's mother (PW2) indicated that the complainant was at the time aged thirteen (13) years old.

Chrisantus Masinde (PW3), a clinical officer at Kitale district Hospital examined the complainant and completed the necessary P3 form. He gave her estimated age to be 12 years and said that her genital organ

had been penetrated thereby concluding that she had been defiled.

P.C. Paul Kamau Mwangi (PW4) of Kitale police station received the appellant at the police station after he was arrested by Administration police officers including **APC Pokat Marei (PW5).** He (PW4) was informed that the appellant had abducted the complainant and taken her to Eldoret. He (PW4) investigated the case and later charged the appellant with the offence of defilement. He indicated that age assessment carried out on the complainant revealed that she was aged sixteen (16) years old.

In his defence, the appellant made an unsworn statement and contended that he did not commit the offence and knew absolutely nothing about it. He said that he was at Bindu centre on 5th November, 2009 when a police officer took and confined him at his (police officer) house before being taken to Kitale police station on the following day.

All the foregoing evidence was considered by the learned trial magistrate who concluded that the case for the prosecution had been proved against the appellant beyond any reasonable doubt. In so concluding, the learned trial magistrate made the following remarks:-

"Having evaluated the evidence of the prosecution's witnesses and the statement or (sic) the accused, I am satisfied beyond a shadow of doubt that on diverse dates between 14/10/2009 and 6/11/2009 the accused committed an act which caused penetration with the complainant. Although in the charge sheet it is alleged the complainant is 12 years old it is her evidence that she is 15 years old. Observing her and listening to her, I did find that she definitely is not 12 years old. She is however not more than 15 years old. She was in class 7 at the time, and this renders my observation even more probable, she testified that on 2 occasions whilst they stayed in the house of the accused's brother in Eldoret the accused had carnal knowledge of her. They slept together and had sexual intercourse were her exact words clearly therefore the accused caused penetration with her. That is corroborated by medical evidence."

In this court's opinion, the evidence by the prosecution was credible and cogent enough to show and prove that the complainant (PW1) was indeed defiled on more than one occasion between the 14th October, 2009 to the 6th November, 2009. Although the appellant denied responsibility for the offence, the evidence showed that he was the culprit. He was not a stranger to the complainant. She knew and trusted him and that is why she accepted to accompany him to wherever he suggested. There was nothing from both the prosecution's and the appellant's evidence to suggest that the complainant may have implicated the appellant without good cause.

In her evidence which was found credible by the learned trial magistrate who had the advantage of seeing and hearing her, she clearly indicated that the appellant defiled her. She said that she and the appellant slept together on the 22nd and 24th October, 2009. In cross examination, she was more direct by saying that she had sexual intercourse with the appellant on the aforementioned days. It was not therefore correct for the learned prosecution counsel to state herein that the complainant did not disclose that she was defiled.

It is apparent that there was a variance in the complainant's age. The charge sheet indicated that she was 12 years old, her mother (PW2) indicated that she was 13 years old, the clinical officer (PW3) talked of 12 years old. The investigating officer (PW4) talked of 16 years old and the complainant herself stated categorically that she was 15 years old.

In her judgment, the learned trial magistrate opined that the complainant was not 12 years old and not more than 15 years old. This was an opinion and did not amount to an amendment of the charge as contended by the appellant's learned counsel and to some extent by the learned prosecution counsel. Therefore, the provisions of section 214 CPC could not apply in the circumstances. In the case of **Jon Cardon Wagner vs. Republic (supra)**, there was actual amendment of the charge by the trial magistrate at the time or stage of judgment.

It is the opinion of this court that the variance in complainant's age did not water down the prosecution's

case against the appellant. In any event, there was sufficient evidence showing that the complainant was certainly not aged 12 years or more than 15 years.

The sentence of twenty (20) years imprisonment imposed by the learned trial magistrate was correct and in accordance with section 8 (3) of the Sexual Offences Act considering that the age of the complainant fell between 12 years and 15 years.

For all the foregoing reasons, this appeal would on evidence lack merit.

As to the alleged violation of the appellant's constitutional rights under section 72 (3) of the old constitution, the charge sheet shows that the appellant was arrested on the 6th November, 2009 and taken to court on 9th November, 2009. He was then held in police custody for an extra three days, more than the prescribed twenty four (24) hours. The matter was not raised before the trial court. It has been raised in this appeal. There has been no attempt by the state to explain the delay. Nevertheless, it is the opinion of the court a delay of three (3) days was not unreasonable considering the nature of the offence and the preliminaries required to be undertaken by the police prior to the arraignment of a suspect in court.

All in all, this appeal is without merit. It must and is hereby dismissed.

Delivered & signed this 16th day of February, 2012. Right of Appeal.

J.R.KARANJA.
JUDGE.