(From original conviction and sentence in Criminal Case No.628 of 2010 of the Senior Resident Magistrate's court at Maralal – A.K. ITHUKU, SRM)

JAMES KAMAU……...APPELLANT

VERSUS

REPUBLIC……...…..RESPONDENT

JUDGMENT

This is an appeal from the judgment of A.K. Ithuku, SRM Maralal, in Criminal Case No. 628/2010, where the appellant James Kamau had been convicted for the offence of defilement contrary to Section 8(1) as read with **Section 8(2)** of the **Sexual Offences Act No.3 of 2006** and was sentenced to serve life imprisonment. In the alternative, the appellant had been charged with the offence of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The court made no finding on that charge.

The grounds upon which the appeal is premised are contained in the amended supplementary grounds of appeal submitted to court together with the appellant's submissions and they are that:-

1. That the appellant's constitutional rights were violated by the police when they detained him for over 24 hours;

2. That the prosecution evidence was contradictory and inconsistent;

3. That the prosecution failed to produce any exhibits;

4. That the police did not take him to the doctor;

5. **That the prosecution relied on the uncorroborated evidence of a minor**.

Mr. Nyakundi, the learned State Counsel opposed the appeal. He submitted that the complainant was defiled by the appellant on two occasions, that the offence was committed in broad daylight and the complainant saw the appellant well; led to his arrest and that the evidence was consistent and truthful and the trial court believed the witnesses.

Briefly, the prosecution case was that PW2, T.W, a girl aged 8 years, after the court carried out a voire dire examination, found her to be eloquent and intelligent. She gave an unsworn statement in her evidence. The court allowed the girl to be cross examined. She was coming from school on 4/10/10; She saw the appellant hiding on the side of the road, he got hold of her and pulled her to his house; locked the

door, removed her pants; removed his underpants and put his male organ into her vagina; He lay on her. He put a sweater in her mouth and when he finished, he chased her and threatened to kill her if she disclosed what had happened to her to anybody. She did not disclose the incident to her aunt. Again on 6/10/2010 about 1.00 p.m. when she was coming from school, the appellant again got hold of her, took her to his house, defiled her and she managed to ran away about 4.00 p.m. Next day, she developed stomach pains and headache and her aunt wanted to know what happened to her. Her aunt took her to school then she was then taken to hospital, and lastly to the police. PW1 said she gave the police the name of the suspect. She told the court that the suspect's room was next to Kinangop bar. She did not disclose the said incidents because the appellant threatened to kill her if she disclosed to anybody. She did not disclose till she was taken to the police station.

M.W.K (PW3) is the appellant's guardian. PW3 recalled that on 6/10/10 around 6.00 p.m., PW2 went home and complained of stomach ache. As PW3 washed PW2, she noticed the presence of blood in the complainant's pant. She enquired what had happened but PW2 did not disclose. She went to PW1's school next day, the teacher and nurse observed PW2 and she was taken to Maralal District Hospital where it was confirmed she was defiled. A report was made to Maralal police station where she disclosed what happened to her and led them to the accused's house. He was not in his house and they went to the video hall where the complainant called out his name as '**Kamau'** and he was arrested.

Sereria Christmas Lemachokoti (PW4), PW2's class teacher, recalled that on 6/10/10 at about 5.00 p.m. the complainant complained of abdominal pains and headache and PW4 asked a teacher, Eunice Kiragu, to take her home. On the next day, PW3 went to the school and informed her that she noticed the girl (PW2) was defiled, they took PW2 to the school nurse and upon examination they noticed that her private parts were reddish and had pus. She was referred to the police station.

PW5, PC Cyrus Nyarangi received a report of defilement and issued a P3 form. They interrogated PW2, and she said she could identify the defiler. Later that night, PW3 called PW5 and informed him that she knew where the suspect could be found and they went to Daystar video where PW2 pointed out the appellant.

PW1, Japheth Kirui of Maralal District Hospital recalled that on 10/10/10, he examined the complainant who was about 8 years. He found that her genitalia were broken, labia majora lacerated, had a foul smell, a discharge and was bleeding. STD and HIV tests were negative. He formed the opinion that she was penetrated.

In his defence the appellant merely said that he worked in Kinangop bar but denied defiling the complainant.

Before I go on to consider the merits of the appeal, one of the grounds of appeal is that the appellant's Constitutional rights under **Section 72 (3)(b)** of the old Constitution were breached in that he was arrested on 9/10/2010 and was not taken to court for plea till 11/10/2010. He wants the conviction to be quashed on that basis. He relied on the case of **Albanus Mwasia Mutua v Republic CRA 120/04**. In that case, the Court of Appeal held hat unexplained violation of constitutional rights of an accused person would result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. The accused in that case had been detained in custody for 8 months. The view taken by the Court of Appeal does not obtain in any case. Under **Section 72(3)** of the old **Constitution,** a person who is arrested or detained for having committed an offence or about to commit an offence, and was not released on bail, had to be taken before a court of law within 24 hours. The provision places the burden to prove that the person was brought to court within a reasonable time on the person alleging that the accused was indeed brought to court within reasonable time. When the appellant appeared before the trial court, there is no evidence that he complained of breach of his rights. Had he done so, the prosecution would have been given an opportunity to demonstrate whether or not the appellant was produced before court within a reasonable time. The appellant did not even disclose the exact time he was arrested for time to be computed. In any event, **Section 72(6)** of the old **Constitution** provided that if a person was arrested and detained unlawfully, he could sue for compensation. In **Gikonyo v Rep. (2009) KLR pg 611** J. Aganyanya, Visram and Nyamu held that even if one proved contravention of **Section 72**, then one

should comply with **Section 84** of the **Constitution,** which meant that one should sue for damages breach of fundamental rights. In **Mwalimu V Rep. (2008) KLR 111**, the Court of Appeal held thus:-

2. Under section 72(3) of the Constitution, where a person charged with a non-capital offence was brought before the Court after twenty-four hours or, where he was charged with a capital offence, after fourteen days, complained that the provisions of the Constitution had not been complied with, the prosecution could still prove that he was brought to Court 'as soon as was reasonably practicable' notwithstanding that he was not brought to Court within the stipulated time.

3. The mere fact that an accused person was brought to court either after the twenty-four hours or the fourteen days, as the case might be, stipulated in the Constitution, did not ipso facto prove a breach of the Constitution. Each case had to be decided on its own facts and circumstances and in deciding whether there had been a breach, the Court must act on evidence.

4. Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the Court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity.

5. The appellant did not complain in the trial Court that he was not brought to Court as soon as was reasonably practicable and it followed that the prosecution was not called upon to show that he had been brought to court as soon as was reasonably practicable. Therefore, there was no merit in the ground of appeal alleging a breach of his constitutional right."

In the end, I find that even if the appellant proved breach of his fundamental rights under **Section 72(3) (b)** of the old **Constitution**, he has a remedy under **Sections 72(6)** and **84** of the said **Constitution.** That breach cannot be the basis for quashing a conviction or setting aside a sentence. That ground must fail.

PW2 was alone when she was allegedly accosted by the person who defiled her. The complainant is a child of tender age i.e. 8 years and the court after conducting a voire dire examination, directed that she give unsworn evidence. Under **Section 124** of the **Evidence Act**, the court can receive the evidence of a child of tender age and proceed to base a conviction on it without corroboration provided the court records the reasons in the proceedings and that the court is satisfied that the child is telling the truth. The **Section** reads as follows:-

"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 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."

It is no longer necessary that the evidence of a child of tender age be corroborated for it to found a conviction provided the court is satisfied that the child is telling the truth.

There is overwhelming evidence on record that the complainant was indeed defiled. PW2's evidence was corroborated by that of PW1, PW3 and PW4. PW1 who did not state what his profession was but said that he is from Maralal District Hospital, examined PW2 and found her genitalia to be swollen, labia majora and minora to be lacerated, had a foul discharge, was bleeding. He found her to have been penetrated. PW3 and PW4 also examined the child and found her private parts injured. The only question is whether it is the appellant who committed the offence.

The offence was committed during the broad daylight on two occasions. PW2 was alone. She said that she had not met the appellant before the first encounter on 4/10/2010. In her evidence, PW2 said she gave the name of the accused to the police but nowhere in her evidence did PW2 tell the court how she came to know the appellant's name. PW5 told the court that when a report was made to the police station, those who reported did not know the name of the defiler. PW2 only said she knew the suspect's house or room, to be next to Kinangop bar and it is that room in which she was defiled.

PW3 told the court that PW2 took the police and PW3 to the house of the defiler but they did not get him. It is later that he was found in a video stall where there were very many other boys but she picked out the appellant. This was in the presence of PW3 and PW5. The complainant had been defiled twice. The assailant had accosted her during the daytime while she was on the road going home. The assailant walked with her to his house where he defiled her. On the second occasion he did the same thing at about 1.00 p.m. PW2 vividly explained what happened to her and the court described the complainant as eloquent and intelligent. I am satisfied that the complainant had ample time to see and be able to identify the appellant. She spent time with him in close proximity during the ordeal and was able to see him well. The appellant did admit that he worked at Kinangop bar. That is where PW2 led the witness to a room next to that bar where the appellant resided. I am satisfied that though a child of tender years, PW2 was able to identify the appellant and he was properly charged. The appellant's defence is a mere denial. There is no reason why this young girl would just pick on him for no good reason. The appellant did not in any way dislodge PW2's evidence and the testimonies of the other prosecution witnesses. The trial court believed the complainant, the fact that she withstood cross examination though she should not have been, having given unsworn evidence. It also noteworthy that PW1 gave a detailed account of the events when she was with the appellant not once but trice during the day time and for quite a longtime. The trial court dismissed the appellant's defence as a sham. I have no reason to interfere with the findings of the trial court which had a chance to see and evaluate the witnesses demeanor.

The appellant complained that he was never taken to the doctor for examination. There is no longer a requirement that the suspect be taken to the doctor unless the circumstances call for it. In this case, it was not necessary to take the appellant to the doctor because it had been over 4 days since the defilement and there would have been no evidence found on the complainant to compare with appellant.

As respects the ground that no exhibits were produced in evidence, there is no requirement in law that exhibits have to be produced in a case. They can only be produced if recovered or if they are relevant to the case. The appellant has not alluded to any exhibits that were relevant, available and yet not produced.

In the end, I am in agreement with the findings of the trial court. I have no reason to differ. The appeal is unmerited. I uphold the conviction and sentence. The appeal is hereby dismissed.

DATED and DELIVERED this 28th day of May, 2012.

R.P.V. WENDOH
JUDGE
PRESENT:
The appellant in person
Mr. Omwenga for the State.
Kennedy – Court Clerk