GABRIEL MWANGI GATHERE.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant, GABRIEL MWANGI GATHERE was charged in the Lower Court with the offence of Defilement of a girl contrary to Section 8(2) of the Sexual Offences Act, and in the alternative, with Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act. The prosecution alleged that on 5th December, 2008 at M village, Mpeketoni, Lamu District, he defiled T.W. a girl aged below 11 years. The appellant pleaded guilty. Following a full trial he was found guilty and convicted on the main charge. He was sentenced to 21 years imprisonment.

2. In his appeal before this court, the appellant has raised nine amended grounds of appeal the bulk of which attack the quality of evidence upon which his conviction was based. He made lengthy handwritten submissions in support of his grounds. The State opposed this appeal reiterated the prosecution evidence in the Lower Court which Mr. Kemo submitted was "water tight." On a first appeal, the court is obliged to look at the evidence of the trial afresh and to draw its own conclusions.

3. The undisputed facts in the Lower Court were that the appellant is a grandfather (although the precise relationship was not established) to the minor T.W. On 5th December, 2008 the appellant took T.W. from her home or his motor cycle to go to the home of one Mama Njeri. He later took her back home as Mama Njeri was not home.

4. It was the prosecution case that during the said trip the appellant sexually abused T.W. and threatened to kill her if she told anyone. The matter came to light after one of the friends of T. W's mother called Mama Esther raised suspicion that the appellant and T.W. had taken time in the bush. Meanwhile T.W. had gone to her grandparents' home (others) when she was called and questioned, she narrated that the appellant had sexually assaulted her on 5th December, 2008.

5. She was examined by the doctor and P3 forms completed on 29th December, 2008. Pc Kimngetich (PW5) got wind of the matter on 24th December, 2009. He visited T.W's home and found the complainant and the appellant's wife. On interviewing T.W. he took up the matter.

6. In his defence the appellant admitted the night trip to Mama Njeri in the company of T. W. but he denied any wrong doing.

7. T.W's evidence was received after a *voire dire* examination. The same was not in the ideal question-answer-format but it elicited information that satisfied the trial court that T.W. was competent to give sworn evidence. T.W. on the face of it did not disappoint. She gave a vivid account of the sexual attack at the hands of the appellant. During cross-examination she explained that she did not immediately report the incident to her mother because the appellant had threatened to kill her if she revealed what had happened in the trip. It must be borne in mind that the appellant was perceived by T.W. as a

grandparent. She ran away to her aunt's place the next day and for all purposes may not have reported the incident had the two women Mama Njeri (the object of the trip) and Mama Esther not visited her mother. This is not the conduct of a child who is making things up or trying to make false accusations.

8. The trial magistrate who saw and heard T.W. believed her evidence and gave his reasons. He sought for corroboration (even though that was not necessary) in the medical evidence and the testimony of T.W's mother (PW2), and her friend CW (PW4). PW4 during cross-examination mentioned a lapse between the time she met the appellant and T.W. at mama Njeri's house, apparently looking for her, and the sound of the bicycle (I presume starting). She stated that it took 40 minutes. Equally PW2 said the round trip took one hour before T.W. was brought back home. Yet Mama Njeri's home was said to be about 1km away, per PW1 while the appellant gave the distance as 1/4km.

On this account, the trial magistrate correctly observed that the appellant had opportunity to commit the offence. T.W's escape from home the very next day goes to confirm her evidence that the night trip to Mama Njeri's was more than that.

9. There was no suggestion at the trial that T.W or her mother had a bad relationship with the appellant therebefore. Indeed that PW2 allowed T.W. to go with the appellant at night rules this out: it appears that even after confirming with T.W. what had happened PW2 was willing to "reconcile" with the appellant and in fact these plans were scuttled by PW5 the police officer when he got wind of it. So that if PW2 was acting malicious, she would have immediately reported to the police. The appellant in his grounds has said that there existed a grudge with T.W's family. This however was not brought out at the trial.

10. The trial magistrate having considered the lapse of time between the occurrence of the offence and examination of T.W. failed to address his mind to the contents of the P3 form but went on to conclude that T.W. had suffered injuries. It is true that T.W. told the court that she experienced pain and bled during the sexual encounter with the appellant. However, the P3 form did not reveal any injuries to the labia or hymen. Only redness was noted on the vagina.

11. This finding raises the question whether penetration was proved in the Lower Court. Whereas the trial magistrate having believed, with reason, the testimony of T.W. was entitled to act on her evidence alone under Section 124 of the Evidence Act, it is this court's view that he should have entered a conviction on the alternative charge.

12. The appellant has complained that his constitutional rights were violated because of delayed arraignment before the court. That is a matter for civil redress and has no bearing on the appeal **(see Julius K. Mbugua v R 2010)e KLR.**

13. For the foregoing reasons, I do allow the appeal, quash the conviction on the main court and substitute therefor a conviction on the alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. Similarly, I would set aside the sentence imposed by the Lower Court and substitute therefor a sentence of ten years imprisonment being the minimum punishment prescribed under the Act.

Dated and delivered at Malindi this 20th day of June, 2012 in the presence of: Mr. Kemo for the State, Appellant present. CC Evans.

C. W. MEOLI
JUDGE