PETER KAMAU *Alias* HAJI SHABAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 1826 of 2008 in the Chief Magistrate's Court

at Thika – Mrs. L. W. Gicheha (SRM) on 29th January 2009)

JUDGMENT

1. Peter Kamau alias Haji Shaban, the appellant herein was tried and convicted for the offence of defilement of a girl contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**. He was thereafter sentenced to serve ten years imprisonment.

2. The brief particulars are that on 20th May 2008 at K[..] slums, in Thika District, within Central Province he committed an act which caused penetration with R.W. a girl of 4 years. (The initials R.W. have been used in place of her names to protect the identity of the minor.) He was also charged with an alternative offence of indecent act with a child contrary to **Section 8(1)(2)** of the **Sexual Offences Act No. 3 of 2006**.

3. Being aggrieved the appellant filed an appeal in which he relied on four grounds which may be compressed as follows:

a) The offence of attempted defilement contrary to Section 9(1) of the Sexual Offences Act was not proved against him.

b) The case was fabricated against him.

c) That enough doubt had been created to secure his release.

d) That the learned trial magistrate ignored his defence.

4. The state opposed the appeal through state counsel Miss Maina, who submitted that the appellant was well known to the child, that **PW2** found the appellant in the act defiling the child, and further that **PW3** the minor's grandmother saw the minor in the company of the appellant, shortly after she received the report of the sexual assault. Miss Maina submitted that there was sufficient evidence on record to support both conviction and sentence and urged the court to dismiss the appeal.

5. I have re-evaluated the evidence on record bearing in mind that the duty of the first appellate court, is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion. In the case of **Kiilu and Anor v Republic [2005] 1 KLR pg 174,** the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions."

6. In her judgment the learned trial magistrate framed the issues for determination as being whether the child, who was a minor, was sexually penetrated and if so, the identity of the perpetrator.

7. Indeed, I agree with the learned trial magistrate that there was no dispute that the complainant was a minor at the time of the offence. The charge sheet gave her age as being four years, **PW4** the mother confirmed that she was born in the year 2003, and the P3 confirmed that she was aged 4 years at the time of examination on 21st May 2008.

8. As to penetration the complainant was too young to explain what was done to her. She however understood that it was something that constituted **"bad manners".** In her own words she said:

"He took me to the toilet and removed his thing for urinating. I was in a dress. He did me bad manners in my place of urinating. He removed my panty. He lifted me and did me bad manners then removed me from the toilet and took me home then helped me put my panty then he bought me a doughnut and chips and 50 cents. I felt pain when he did me bad manners. I was crying. Someone came to help me Kamande he is big."

9. The appellant laid great emphasis on the R.W's response in re-examination which stated that **"it is my mum who told me what to say"**. I however considered all the evidence tendered by R.W in re-examination to place her response in context. After stating the above statement she went on to state as follows:

"The accused did bad manners, my mother did not tell me to come and lie, he *(the* appellant*)* ***did me bad manners".***

10. Although, by virtue of **Section 124** of the **Evidence Act**, **Cap 80 Laws** of **Kenya**, there is no specific requirement that the evidence of a victim of a sexual offence must be corroborated, in this case there was corroboration from **PW2,** one John Kamande a neighbour to the minor and her family. **PW2** testified that he was passing by a public toilet on 20th March 2008 at 4 p.m. when he heard a child carrying from within. He went into the latrine to check what was happening and found the appellant and the minor. In his own words he stated as follows:

"When I checked I saw accused was standing and the child was being held up he had lifted child up to his waist. He was defiling the child I have known Shabane for long. I decided to go look for the mother. I identified the child".

Both the appellant and the minor were known to **PW2**. He reported what he witnessed at the public toilet to R.W's grandmother.

11. **PW3** was the grandmother to R.W. and she confirmed that **PW2** reported to her that Shabane and R. W. were in the public toilet and that R.W. was crying. **PW3** went towards the public toilet and met the appellant coming from the direction of the toilet with the minor in tow. The appellant was known to **PW3.** R. W. had in her hand 50 cents which she did not have before. R. W. reported to **PW3** that the appellant took her into the toilet, and did bad manners to her, and that he had promised to buy her a doughnut and chips.

The appellant tendered evidence without oath in his defence and did not call any witnesses. He gave a convoluted testimony the sum of which was that the family of Wa-shai, to which the minor belongs, was in the habit of going around everywhere beating and even killing people. He testified that they beat and burnt up his brother on the railway and that they had killed five other persons too. They had beaten and injured his mother on the hand, and when they met him on the ill-fated day they began to scream. He dismissed the evidence of all members of that family as lies and stated that the Wa-shai family members

were thieves.

12. I have re-assessed the evidence on record. I find nothing to support such strong accusations against the family of R.W. I also note that **PW2** the eye witness, was a neighbour and not a family member.

13. The appellant urged this court to discredit the evidence of **PW2** because of his conduct upon witnessing the sexual assault on R.W. He called the conduct of **PW2** into question because **PW2** did not scream to draw attention, or do anything to stop the assault on a very small child whom he knew, yet he was armed with a mattock. While it is unfortunate that **PW2** did not take on the appellant on his own to rescue the minor, the evidence does indicate that he reported the incident to R.W.'s grandmother immediately and this later led to the arrest of the appellant by members of the public.

14. The appellant, in his submission pointed out contradictions in the evidence of the prosecution witnesses, and in particular the evidence of R. W. in which she stated that he defiled her at her place, but went on to add that he removed her from the toilet after the act and took her home to put on panties, after the assault.

15. From my analysis of the evidence I did not understand R.W.'s statement that **"you defiled me at our place"** to be confined to the house wherein she lived. I understood it to mean her home generally and this included the public toilet she used daily. I certainly doubt that R.W. being a four year old infant would have used a word such **"defiled"** in her testimony. It is desirable that the court should use words as close as possible to what a minor witness or any witness uses their testimony even if it includes asking for a demonstration from the witness to provide a clearer meaning.

In **SAMSON OGINGA AYIEGO VS. REPUBLIC CR. APPEAL 65 OF 2006** (unreported) the court of Appeal sitting at Kisumu observed that:

" "Defiled" is a technical term. It is quite improper to use such term or any other technical term when recording evidence of a witness unless the witness himself or herself used it. The correct approach is to use the words used by the witness. We do not believe that PW1 or any other witness used that term in proceedings before the court."

16. The appellant also pointed at contradiction in the evidence of R.W. and **PW2** on one side and that of **PW6** the Doctor. That R.W. and **PW2** testified that the assault occurred in a public toilet in the compound of **PW3** while **PW6** testified that it occurred by the roadside. I found no contradiction in this evidence because the evidence of **PW2** was that the public toilet in which he found the appellant and the minor was near a road. Indeed it was as he was passing along the road that goes by the toilet that he heard the minor crying from within.

17. In his written submissions the appellant urged that there was no evidence of defilement and that, therefore, the learned trial magistrate was wrong to base findings on mere suspicion in finding him guilty for the offence of attempted defilement in his view the injuries found on the minor's genitalia amounted circumstantial evidence.

18. In my analysis of the evidence on record, I find that it was direct and not circumstantial. It was the testimony of **PW1, PW2** and **PW6** observed with their own senses. The trial court was right in convicting him for the offence of attempted defilement contrary to **Section 9(1)** of the **Sexual Offences Act** even though he was not charged with it because the offence for which he was convicted is also to be found in the Sexual Offences Act. **Section 186** of the **Criminal Procedure Code** confers that mandate upon the court. The said section provides as follows:

"When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."

19. I have re-appraised and re-evaluated the evidence on record in its entirety and I am unable to make

any other findings or reach any other conclusion that is different from those reached by the learned trial magistrate. I therefore find that the evidence on record was sufficient to sustain the conviction entered against the appellant.

20. On the sentence, **Section 9(1)** of the **Sexual Offence Act** under which the appellant was convicted provides for imprisonment for a term not less than 10 years upon conviction. The learned trial magistrate therefore imposed the minimum sentence under the law and I have no reason to interfere with it.

For the foregoing reasons I find that the appeal is unmeritorious and I dismiss it. I confirm both the conviction entered, and the sentence imposed upon the appellant by the trial court.

SIGNED DATED and **DELIVERED** in open court this ***20th* day** of ***June* 2012.**

L. A. ACHODE

JUDGE