MUSYOKA KASANDI……...…….....APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Principal Magistrate's Court Sexual Offence No. 1/2009 by Hon. B.M. Kimemia-SRM on 11/8/2010)

JUDGMENT

The Appellant was charged before the Principal Magistrate's Court at Kitui with the offence of defilement contrary to section 8(1) (2) Sexual Offences Act. It was alleged that on 20th September, 2009 at around 10.00 p.m. at […] village, […] sub-location, […] location in Kitui West of the Eastern Province, he defiled **M.N.** a Child aged 12 years. The appellant also faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act, particulars thereof being that, on 20th September, 2009 at around10.00pm at […] village […] sublocation, […] location in Kitui West District of the Eastern Province he committed an act of indecency with **M.N.** a child aged 12 years by touching her private parts, namely Vagina. The appellant denied both counts and was put on trial.

Briefly, the prosecution case was that **M.N.,** (PW1) who is the complainant was at the time a minor aged 12 years. On the material day, she was sleeping with her brother in the house. At about 10p.m, the appellant who was a neighbor came and knocked the door and she opened for him. The appellant took her outside behind the grandmother's house and held her hand, removed her pants, put her down and lay on her. He then defiled her for 3 hours and she felt a lot of pain. In the meantime, her grandmother **T.K.** (PW3),who was in her house heard some noise outside and opened the door, whereupon she saw the complainant run away. She followed her to their house about 10 meters away and asked her whom she had been with and she responded that it was the appellant. PW3 then called her father who came and they reported the incident to Kabati Police Post and she went for treatment. The appellant had on prior occasions defiled her 4 times and warned her that if she told anyone, he would kill her. The appellant was working at her aunt's home though

PW3 knew the appellant very well since his wife had died and he used to come to her home for water. The complainant had admitted to her that she was with the appellant and they were sleeping together doing what people do. Before calling the complainant's father she went to the village elder and reported the incident. The complainant's father came on 5th October, 2009 and they went to report, whereupon the appellant was arrested.

PW4 **P.C Esther Munyalo,** received the report and took the complainant to […] Hospital where she was treated and discharged. She issued a P3 form to the complainant which was filled by PW5, Clinical Officer **Dorcas Wanza** who examined the complainant and noted that her hymen was broken and there was slight vaginal discharge with no organism nor spermatozoa. She concluded that there was penetration and placed her on medication.

Eventually, the appellant was placed on his defence. He elected to give a sworn statement and called his daughter **Kavengi Kathini** as a witness. It was his defence that on 20th September, 2009 he went to see

an elder at his home. On 2nd October, 2009 he was working at Kihinga's home. He left home on 18th September, 2009 and went to his daughter's residence where he remained working until 20th October when he returned home. That he could therefore not have committed the offence as he was at his daughter's place at the time of the alleged offence. DW2 **Kavengi Kathini** the daughter of the appellant confirmed that on 18th September, 2009, the appellant went to her home to do shamba work and remained there upto Monday 20th October, 2009 when he left for his home.

The learned magistrate having carefully considered the evidence on record was persuaded that the prosecution had proved its case against the appellant, convicted him and sentenced him to 22 years imprisonment. The appellant was aggrieved by the conviction and sentence. He therefore lodged the instant appeal on the grounds that the proceedings were conducted in violation of section 85(2) of the Criminal Procedure Code. The evidence of the clinical officer should have been rejected as he was incompetent, the prosecution case was not proved to the required standard and finally, his defence was rejected for no apparent reason.

When the appeal came before me for plenary hearing on 3rd May, 2012, the appellant elected to canvas the same by way of written submissions which I have carefully read and considered.

The appeal was opposed. **Mr Mukofu,** learned State Counsel orally submitted that the appellant was positively identified by the complainant. He was a neighbour after all. The appellant defiled her previosuly. The evidence of the clinical officer confirmed penetration. On the basis of the foregoing, the appeal lacked merit. He therefore urged me to dismiss it.

After setting out the facts and the evidence, together with the grounds of appeal and respective submissions, it is now my duty as a first appellate court to re-appraise and evaluate the evidence afresh with a few to reaching my own independent conclusion on the case. The reason for my doing so is that the appellant on a first appeal expects the appellate court to rehear the case and come to its own findings on the evidence on record. This court will do its bit against the understanding that it will not have the benefit for hearing and seeing the witnesses who testified during the trial. This position of course deprives this court of the opportunity to appreciate the demeanor of such witnesses. It is the demeanour of a witness that partly informs a court in deciding whether to believe this or that witness. In spite of this handicap, this court must do its duty and satisfy the appellant that it has not simply glossed over the evidence without giving it a proper and substantive analysis. *See* **Okeno vs Republic [1972] E.A. 32** and **Kariuki Karanja vs Republic [1986] KLR 190.**

From the record the particulars in the two counts preferred against the appellant are to the effect that the offences against PW1 were committed on 20th day of September, 2009 at around 10.00p.m. The appellant was however arrested on 7th October, 2009 about 16 days after the alleged commission of the offence. Yet the Appellant and complainant were neighbours. PW1 the alleged victim and her grandmother reported the offence on 5th October, 2009 and she was sent to hospital on 6th October, 2009. What hindered PW3 and any other concerned person to act on 21st September, 2009 to either take PW1 to hospital or even make a report to any relevant authority? Could a caring parent or guardian actually remain silent if his/her child had been defiled by a known assailant and fail to lodge a complaint immediately or take the victim to hospital?

It was only the evidence of PW1, a minor who claimed that the appellant had defiled her on the night of 20th September, 2009 and no other eye witness testified in her support. This amounts to a single testimony by a minor. The learned trial magistrate did not warn/caution herself on the dangers of relying on the evidence of a single witness before entering a verdict of guilty as charged against the appellant. Ofcourse the proviso to section 124 of the Evidence Act is to the effect that where in a criminal case involving a sexual offence and 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. In this case, there was total failure by the good magistrate to comply with these mandatory provisions of the law. She neither stated that she believed the testimony of the victim despite being a

single and minor witness and if she did, she never recorded reason(s) in proceedings.

That was a fatal error. The complainant too told the court that she and the appellant had met at some village elders home in the month of July to deliberate on the issue. She further claimed that the meeting was attended by the area chief. Could elders and the chief meet to deliberate on an issue of this nature and magnitude and leave the assailant go scot free without proper action being taken against, him, a well known culprit? The complainant further told the court that, it was decided that they wait for her father before the arrest could be effected. What was it that the father of the complainant could do with regard to the allegation of the alleged defilement that was not already in the domain of the elder and the chief? No prompt action was taken against the appellant. This inaction buttresses the appellant's complaint that the family of PW1 conspired to frame him with the instant case. If a meeting over the incident was held in the month of July, as PW1 alleged why was the appellant not charged for committing offence immediately and not later?

Again if indeed the appellant had defiled PW1, could the father to the complainant, the elders and the area chief fail or decline to testify against him in the case. I do not think so. To my mind evidence of the elders, father to PW1 and the chief was very crucial for the just determination of this case. In the absence of these key witnesses, I doubt whether the case was proved beyond a shred of doubt. Again such omission may lead to the drawing of the inference that perhaps their evidence would have been adverse to the prosecution case.

Coming to the evidence of the clinical officer though she claimed the hymen of the victim was broken she never gave the age of the injury. The record also shows that PW1 was sent to PW5 on 6th October, 2009 and not on 20th September, 2009. How then could PW5 claim that PW1told her on 20th September, 2009 about the incident? Secondly her claim that the child had not disclosed to her grandmother about the incident is an outright lie. The testimony of PW1 is to the effect that in July they were before the elders and the chief to deliberate on the issue. How then could PW5 claim that the incident was not known to any person? Further, it was desirable for PW5 to show the age of the injury and its decree so as to tie the appellant to the offence.

Put on his defence, the appellant elected to advance a sworn statement and called one defence witness. He told the court that he left his home on 18th September, 2009 for the daughter's home to assist her with some work. He remained there until 20th September, 2009. His defence witness, DW2 told the court that he indeed worked for her from 18th September, 2009 and left her home on 20th September, 2009 at 9.00p.m. If the appellant left at 9.00p.m on the material day as DW2 stated and the offence was allegedly committed at 10.00p.m, could he have been the assailant if one needed a motor vehicle to reach his home in time, which home neighbours that of the complainant. At this juncture the learned trial magistrate misdirected herself grossly. The learned trial magistrate introduced so many theories in his judgment that neither featured in the testimonies of the prosecution witnesses nor defence case.

In her judgment, the learned trial magistrate appears to stage manage the prosecution case by introducing the following fanciful theories:-

"I note that the complainant stated that she was defiled at around 10.00p.m and there was no demonstration of the distance between the home of DW1 and 2. I however noted that its within the same area of Mutonguni location. I note that Nguetanoi village and Chondoni village one can take at least 40 minutes walking on a normal pace i.e 2-3 kilometres.

The question is who gave the distance estimates to the presiding magistrate and the walking speed. This was a gross miscarriage of justice as the trial magistrate was only required to act on the evidence before her and not introduce theories meant to stage manage the case for the prosecution. She may be familiar with the terrain of the area. However she was not a witness. She cannot substitute her knowledge of the area for evidence. Trial courts should always leave the evidence on record to speak for itself. Because of these theories the learned trial magistrate's has been accused by the appellant and rightly so in my view, of evaluating the evidence before her partially as opposed to impartial. This was against the principles of

fair trial for the learned trial magistrate to fill gaps left by the prosecution side in order to make a case against the appellant. It is said that it is the duty of the prosecution to prove their case against accused beyond any shred of doubt. On the other hand the appellant assumes no burden of proving his innocence, but only to raise doubts in the prosecution case. It would appear that the learned trial magistrate decided to rely on very minor inconsistencies in the defence case to reject the plausible alibi defence yet failed to resolve the major omissions in the prosecution case in favour of appellant.

Finally, there is the question of the age of the victim. As I have had occasion to state in the past, in its wisdom or lack of it, parliament chose to categorize the gravity of that offence of defilement on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) of the Sexual Offences Act. In this case, the age of the complainant was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was an estimate made in the P3 form dated 6th October, 2009 by the clinical officer. However, this cannot pass for evidence of age. There was no evidence of any of her parents as to her actual date of birth. To my mind therefore, the age of the victim which is a necessary ingredient of the offence charged was not proved beyond reasonable doubt. It follows again therefore that the appellant's conviction and sentence was irregular. It follows again upon such finding that the sentence imposed upon the appellant had questionable legality and thus entitles this court to interfere.

In the result, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT DATED, **SIGNED** and **DELIVERED** at **MACHAKOS**, this **15TH** day of **JUNE**, 20**12**.

ASIKE-MAKHANDIA
JUDGE