(From Original Conviction and Sentence in Criminal Case No.72 of 2010 of the

Principal Magistrate's Court at Mariakani: D.M. Machage – S.R.M.)

AML.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein **AML** has filed this appeal against his conviction and sentence by the learned Principal Magistrate sitting at Mariakani Law Courts. The Appellant was first arraigned in court on 17th March 2010 on a charge of **DEFILEMENT OF A CHILD CONTRARY TO SECTION 8(1) as read with SECTION 8(4) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the charge were that:

"On the 6th day of February, 2010 in Kinango District within Coast Province, unlawfully and intentionally committed an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of K.M.N. a child aged 17 years"

The Appellant entered a plea of ***"Not Guilty"*** to the charge and his trial commenced on 31st May 2010. The prosecution led by **CHIEF INSPECTOR MOHAMED** called a total of four (4) witnesses in support of their case.

The complainant a 16 year old girl in her evidence told the court that sometime in the year 2010 she was living with her brother in Samburu township. She met the Appellant who seduced her on her way back from school. The complainant accepted his advances and the two became lovers. They engaged in sexual intercourse several times. In February 2010 the complainant missed her periods. Alarmed that she was pregnant she called the Appellant to inform him. Later the complainant's brother confronted her about her relationship with the Appellant and he beat her up. He reported the matter to their father **NNG PW2** who also beat up the complainant demanding that she reveal who her lover was. The complainant revealed that it was the Appellant. She was taken for medical examination and a pregnancy test which turned out negative. The matter was reported to police after which the Appellant was arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed onto his defence. He opted to make a sworn defence in which he denied ever having had a sexual relationship with the complainant. The Appellant told the court that he was framed. On 25th October 2010 the learned trial magistrate delivered his judgement in which he convicted the Appellant of the offence of Defilement and thereafter sentenced him to serve ten (10) years imprisonment. Being aggrieved the Appellant filed this present appeal. The appellant who appeared in person during the hearing of this appeal chose to rely entirely upon his written submissions which with the leave of the court had been duly filed. **MR. TANUI** who appeared for the Respondent State gave notice of the intention of the State to seek an enhancement of sentence. The court did explain to the Appellant the nature and effect of this

notice to which the Appellant replied:

"I do understand that the State wants to enhance my sentence. I still wish to proceed with my appeal. I will rely on my written submissions"

I have carefully perused the written submissions filed by the Appellant. I note that in them he raised three (3) broad grounds of appeal. These were:

- Failure to conduct a voire dire examination

- Failure to conduct a DNA test on himself

- Insufficiency of evidence

- Failure to consider his defence.

On the first ground the Appellant submits that the failure by the trial magistrate to conduct a voire dire examination on the complainant rendered her evidence inadmissible and was thus fatal to the prosecution case. The term ***'voire dire'*** is a French term and literally means ***'tell the truth'***. The law requires that a voire dire examination be conducted on a child of **tender years** before his/her evidence is received in court. The purpose of such an examination is to enable the trial court determine firstly whether the child in question comprehends the nature and effect of an oath and secondly whether that child understands the importance of telling the truth. As I have stated earlier the law requires that a voire dire examination be conducted **only** on a child of tender years. A **child of tender years** is taken to mean any child aged 14 years or below. The complainant in her evidence gave her age as 17 years. She was well above the age of 14. Indeed she was just a few years shy of the majority age. In the circumstances therefore the trial court was not obliged to conduct a voire dire examination before receiving her evidence. As such I find that the complainant's evidence was properly taken and received by the court. I find no merit in this ground of the appeal which is hereby dismissed.

The second ground of appeal raised by the Appellant was that no DNA test was conducted on the Appellant himself. In my view no DNA test was necessary. Although the complainant having missed her menses initially though she was pregnant it later came to transpire (after a pregnancy test being conducted) that she was not pregnant – it was a mere false alarm. There was no foetus and no baby thus there was no need for a DNA test to establish paternity. The fact of rape or defilement is not proved by way of a DNA test but by way of evidence. I therefore dismiss this ground of the appeal.

I will not proceed to analyze the evidence adduced by the prosecution. This being a charge of defilement the age of the complainant was a crucial factor which required proof by way of tangible evidence. The complainant herself told the court that she was 17 years old having been born on 21st May 1993. **PW2** the complainant's father confirms that his daughter was born on 21st May 1993. Although both witnesses claim that the complainant's birth documents existed to prove her age these documents were not produced in court as they claim to have left them at home. However all is not lost. **PW3 ROBERT NJOROGE KIHUGU** a clinical officer attached to the Samburu Health Centre did tell the court that he conducted an examination on the complainant in order to ascertain her age. As a medical practitioner **PW3** was well qualified to do so. His findings were that the complainant was 16 years old and he produces his age assessment report as an exhibit in court **Pexb2**. This corroborates the evidence that born in May 1993 the complainant was just a few months shy of her 17th birthday at the time of the incident. Therefore by the time the trial commenced in May 2010 the complainant was indeed 17 years old as she told the court. I am satisfied therefore that the complainant's age was proved satisfactorily.

The complainant told the court that she was defiled severally by the Appellant. Although by all accounts she was a willing participant in these sexual encounters, the complainant being a minor had no legal capacity to give consent. The fact of defilement finds corroboration in the evidence of **PW3** who examined the complainant on 16th May 2010. He told the court that he found that her hymen was

perforated which is clear evidence that sexual activity had taken place. **PW3** filled and signed her P3 form which is produced in court as an exhibit **Pexb1**. I am satisfied that this aspect of the charge has been sufficiently proved.

The complainant identifies the Appellant whom she said was her boyfriend as the man who defiled her. The Appellant was a person well known to her added to which the complainant told the court that they had been lovers since 2008 and had engaged in sexual intercourse several times. On his part the Appellant denies ever having engaged in a love affair with the complainant. However this is belied by the fact that upon receiving news of the complainant's supposed pregnancy the Appellant's family sent emissaries to the complainant's father to discuss the issue. What discussion was needed if the Appellant had no relationship with the girl? Further when the complainant told the Appellant that she had reported the affair to her father, the Appellant did not disown her and send her on her way. Instead he took the complainant to Taru with him for the day and later took her to his own home where they spent the night. The Appellant's own brother **ML DW2** confirms that the complainant spent the night in their home. The actions of the Appellant are not those of a person who has been falsely accused. Rather his are the actions of a man who knew and accepted the possibility that he had fathered a child with the complainant. In his judgement at page 3 line 25 the learned trial magistrate observed:

"The complainant appeared before me and gave her evidence in a straight forward and candid manner. I find her an intelligent and honest girl"

These were the observations of the judicial officer who saw and heard the complainant testify. I have no reason to hold a contrary opinion.

On the whole I am satisfied that the evidence adduced shows and the Appellant's own actions confirm that he and the complainant were lovers. Notwithstanding the fact that the complainant was a willing participant in the affair the law makes any act of sexual intercourse with a girl under the age of 18 years a crime. I am satisfied that the prosecution did prove this charge of defilement against the Appellant and I have no hesitation in confirming his conviction.

The appellant was allowed an opportunity to mitigate after which he was sentenced to serve ten (10) years imprisonment. Section 8(4) of the Sexual Offences Act 2006 provides for a mandatory minimum sentence of 15 years imprisonment upon conviction for defiling a girl aged between 16 – 18 years. Therefore the sentence meted out on the Appellant was unlawful and cannot stand. As I stated at the beginning of this judgement despite being cautioned by the court about a possible enhancement of sentence the Appellant stuck to his guns and insisted on proceeding with his appeal. Having confirmed his conviction I do now set aside the unlawful ten (10) year term of imprisonment and substitute instead the lawful mandatory minimum term of fifteen (15) years to run from the date of conviction by the lower court. This appeal thus fails in its entirety.

Dated and Delivered in Mombasa this 27th day of July 2012.

M. ODERO
JUDGE

In the presence of:

Appellant in person

Mr. Gioche for State