MOSES NDAU MWARIMBO ……..…….…… APPELLANT

=VERSUS=

REPUBLIC …….…….……... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 384 of 2009 of the Senior Resident Magistrate's Court at Taveta: ***C.N. Ndegwa S.R.M.)***

JUDGEMENT

The Appellant herein **MOSES NDAU MWARIMBO** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Taveta Law Courts. The Appellant was arraigned in court together with one **STEPHEN ONYANGO BIKO** (hereinafter referred to as the ***"2nd accused"***) and they were jointly charged on the first count of **ORGANIZING FOR CHILD PROSTITUTION CONTRARY TO SECTION 15(a) OF THE SEXUAL OFFENCES ACT, 2006**. The particulars of the offence were that:

"On the 16th day of July 2009 at about 11.30 A.M. in Taveta District within Coast Province, jointly and knowingly organized for a child under the age of 15 years namely E.T.F to remain in the house of STEPHEN ONYANGO BIKO for the purpose of causing the said child to have sexual intercourse"

The Appellant on his own faced a 2nd count **of DEFILEMENT CONTRARY TO SECTION 8(1) as read with SECTION 8(3) OF THE SEXUAL OFFENCES ACT, 2006.** The particulars of the case were that on 16th July 2009 the Appellant who was a teacher of the complainant sent for the child. When the complainant went to the house where the Appellant was the Appellant pulled her into the house and began to fondle her breasts. He then proceeded to defile the child. After the act the Appellant left leaving the child locked inside the house. He returned shortly thereafter and defiled the complainant a second time. The Appellant then took a basin of water, wiped himself and left.

In the meantime the headteacher of M Primary School where the complainant was a pupil decided to conduct an impromptu inspection of staff houses to recover books stolen from the school. The complainant told the court that the Appellant came rushing back to the house and took her to a nearby toilet and hid her there. She was later found there by **MR. MAKANGE PW2** one of the school teachers. The complainant reported that she had been hidden there by the Appellant who had also defiled her. She was then taken to hospital for treatment. The Appellant was arrested and taken to the police station where he was charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was put onto his defence. He opted to make a sworn statement by which he totally denied having defiled the complainant.

On 27th July 2011 the learned trial magistrate delivered his judgement. He proceeded to convict the Appellant on both Counts 1 and 2 of the charge and thereafter sentenced him to serve twenty (20) years imprisonment on each count. Being dissatisfied with both his conviction and sentence the Appellant filed

this present appeal. **MR. GEKONDE** Advocate argued the appeal on behalf of the Appellant whilst **MR. JAMI** learned State Counsel who appeared for the Respondent State opposed the appeal.

I will proceed to consider first the evidence in relation to the first count of the charge. In this count the Appellant faced a charge of ***"organizing for child prostitution"*** contrary to Section 15(a) of the Sexual Offences act. The particulars of the charge read that the Appellant and another:

"Knowingly organized for a child under the age of 15 years namely E.T.F to remain in the house of STEPHEN ONYANGO BIKO for the purpose of causing the said child to have sexual intercourse"

The man named in these particulars ***'Stephen Biko'*** (who was the Appellant's co-accused in the original trial), was eventually acquitted of the charge by the trial court. Having acquitted the Appellant's ***'partner-in-crime'*** so to speak, it is difficult to understand how and why the trial court proceeded to convict the Appellant of this charge. The Appellant is charged with ***'organising'*** for child prostitution. If the person whom he is accused of ***'organising'*** with is acquitted for lack of evidence, then it stands to reason that the Appellant cannot be convicted of the same offence.

The particulars of Count No. 1 indicate that the house in which the complainant was held belonged to this ***'Stephen Biko'***. However there is clear evidence from **JENELIZA MUGOI MUTANYA DW3,** that the house in question belongs to a womens group of which she is a member. **DW3** is categorical that the tenant of said house was the Appellant himself and **not** this Stephen Biko. **DW3** states at page 28 line 12:

"Mr. Ndau [the appellant herein] was the tenant but he was always in arrears of rent …. The house belongs to Ndau"

The learned trial magistrate in his judgement accepted the evidence of **DW3** and found that the Appellant had free access to the house and did not require permission from his co-accused to be there. It would appear that the police did not take care to establish who the true tenant of the house was. As such I find that one crucial aspect of the particulars i.e. the ownership of the house in question is directly contradicted by the evidence on record. As such I find that the conviction of the Appellant on this first count is unsafe and I do hereby quash the same. The twenty (20) year sentence of imprisonment with respect to this count is also set aside.

I will now proceed to analyze the evidence adduced in support of Count No. 2 of Defilement. In arguing the appeal Mr. Gekonde submits that the exact age of the complainant has not been proved by way of documentary evidence rendering the charge unproven. There can be no doubt that the way in which the Sexual Offences Act 2006 has been framed makes it essential that the age of the victim in a charge of defilement be proved beyond a reasonable doubt. Certainly the best proof of any person's age would be a birth certificate. However as a court I am mindful of the fact that few families especially in rural Kenya bother to acquire birth certificates for their children. As such other documents like baptism cards, vaccination cards, school records etc are equally admissible as proof of age. In this case no such document was produced to prove age. Does failure to produce documentary evidence of age automatically mean that the question of age remains unproven?

The complainant herself gave her age as 14 years. Her P3 form **Pexb4** which was filled by a medical practitioner who is well placed to assess age gave the complainant's age as 14 years. The trial magistrate who saw the complainant in his court obviously assessed the complainant's age to be a child of tender years. This is evidenced by the fact that he deemed it necessary to conduct a voire dire examination on the complainant before proceeding to take her evidence. In law a child of tender years is taken to mean a child aged 14 years or below.

More importantly on this point the accused himself in his defence conceded that the complainant was aged 14 years. At page 24 line 33 the Appellant clearly says:

"I am a teacher. I know E.T.F. She was my pupil at M Primary School in 2009 July. She was in class

seven. <u>She was 14 years old</u>. I understand the charges I am facing" *[my emphasis]*

With such a clear statement by the Appellant himself the age of the complainant cannot be said to have been in any doubt. I have no doubt that as her teacher the Appellant was well aware of the complainant's age. From the combination of this evidence I am satisfied that there exists sufficient proof that the complainant was aged 14 years at the time bringing this incident squarely within the ambit of Section 8(3) of the Sexual Offences Act.

The next question to be determined is whether the complainant was in fact defiled by the Appellant as she has alleged. The complainant in her testimony at page 6 line 27:

"Accused removed my underpants and skirt and then removed his trouser. He also removed my blouse (shirt) and I remained wearing my top (spaghetti). Accused removed the underpant he was wearing. The penis was erect. He fondled me. He put a condom on his penis. It was a trust condom. This is one of the condoms that was collected from the house. He lay on top of me and had sex with me for five minutes. The condom burst and something poured on my thighs. The watery substance was white. He took five minutes to have sex with me. After that he left wearing his clothes"

The complainant here has given a very detailed and graphic account of the incident. She gave an equally detailed account of the second episode of defilement which took place a few minutes after this first one. This is highly unlikely to have been a fabricated story. The fact of defilement is corroborated by the fact that the complainant told her teacher **MR. MAKANGE <u>PW2</u>** who found her in the toilet that the Appellant had defiled her. The complainant was consistent and at no time did she change her story. **<u>PW7</u> DR. NGENO** the doctor who examined the complainant told the court that her hymen was missing. This is clear evidence of defilement. He filled and signed her P3 form which he produced in court **<u>Pexb4</u>**. From the weight of this evidence I have no doubt whatsoever that indeed the complainant was defiled on the material day.

On the issue of identification the Appellant was a person who was very well known to the complainant. He was her teacher and they interacted on daily basis at school. The incident occurred in the middle of the day from about 11.30 A.M. It was broad daylight and visibility was good. The complainant spent more than an hour in the company of the Appellant. He spoke to her and she had ample opportunity to see and identify him. In any event the complainant a mere child would have had no reason to frame the Appellant. There was no evidence of a pre-existing grudge between them.

Further corroboration of this incident is provided by the fact of the recovery of a used condom inside the house of the Appellant. **<u>PW2</u>** who was one of the teachers who went to the house of the Appellant told the court at page 9 line 20:

"Near the house we found Mr. Ndau who joined us. He was sweating. Biko opened the door. We entered inside. We found a freshly used condom on the ground"

This corroborates the evidence of the complainant that the first time the Appellant defiled her he used a condom which burst. This would explain the presence of the ***'freshly used condom'*** on the ground. This suggests that sexual activity had recently taken place inside that house.

The complainant in her evidence told the court that after defiling her the Appellant left her in the house. He later came running back only to drag her out of the house and into a nearby toilet where he hid her. This action of the Appellant coincided with the school management's decision to search staff houses. The Appellant obviously did not want the teachers to find one of his students half-dressed inside his house. **<u>PW2</u>** one of the teachers involved in the search confirms that he needed to use the toilet and on going there found one of their students inside the toilet. Counsel for the Appellant argues that the toilet is a public facility which any person could access. However as I had stated earlier the complainant had no reason to lie against her teacher. Even if one were to argue that the complainant went to the toilet on her own volition, it is curious that she was found there half-dressed wearing only a spaghetti top and a lesso. It is clear that she had been taken there hurriedly.

From the weight of the evidence on record I am convinced that the Appellant did infact defile the complainant as she has alleged. The complainant was a minor and therefore her consent if any was irrelevant. The Appellant being an adult and her teacher ought to have known better. I am satisfied that the Appellant's conviction on the charge of Defilement was sound and I do uphold the same. Similarly the twenty (20) year term of imprisonment imposed by the trial court is in my view both lawful and appropriate and I do confirm the same. As such this appeal fails and is hereby dismissed.

Dated and Delivered in Mombasa this 20th day of July 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Gekonde for Accused

Mr. Gioche for State