REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 382 OF 2009

G.M.K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case Number 513 of 2007 in the Chief Magistrate's Court at Thika – B. A. Owino (SRM) on 28th August 2009)

JUDGMENT

1. **G.M.K.,** the appellant herein was tried and convicted for the offence of defilement contrary to **Section 8(1)(2)** of the **Sexual Offences Act**.

2. The brief particulars were that on the 9th day of January 2007 at [...] Estate in Thika District of the Central Province, committed an act which caused penetration with J.W. a child under the age of 11 years.

3. Upon conclusion of the trial the learned trial magistrate sentenced the appellant to 15 years imprisonment.

4. The appellant immediately filed a petition of appeal dated 10th September 2009. The grounds of the appeal were that the conviction and judgment were based on uncorroborated evidence from the prosecution, that the medical evidence was not cohesive, and further that the trial was unprocedural since the ruling and judgment were not read.

5. The learned state counsel, Miss Mwanza, opposed the appeal and supported both conviction and sentence. She submitted that there was no case of mistaken identity since the complainant was the step daughter to the appellant, and was staying with the appellant when he sexually assaulted her.

6. Miss Mwanza also submitted that the minor took the earliest opportunity to report the incident to her mother, and that the doctor who examined her made a finding of a penetrative sexual act involving the minor. That therefore the conviction was sound. She further submitted that the remedy for the appellant, if his rights were contravened under **Section 72** as read with **Section 49,** both of the repealed constitution, lay elsewhere and not within this case.

7. I have scrutinized and reassessed the evidence on record anew bearing in mind the decision of the court of Appeal in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR**. In the said case the court of Appeal held that:

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-

evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

On the lack of corroboration and cohesion in the medical evidence as submitted by the appellant in his first and second grounds of appeal, I have particularly scrutinized the evidence of **PW1** the minor, **PW2** her mother and **PW3** the Doctor. The minor testified on oath that the appellant who is her father lived in [...] while her mother lived elsewhere at [...]. That she and her siblings lived with their mother at [...]. That the appellant took her and her younger brother aged 9 years from [...], to stay with him in [...] on the fateful day of 9th January 2007.

8. It was the minor's testimony that after the appellant had prepared and fed the children supper, he instructed the complainant to come with him to the bus stage to look for her mother whom they had left behind in [...]. Somewhere along the way to the said bus stage the appellant got hold of her hand and drugged her into a maize garden. He forced her to lie on the ground, removed her pants, lowered his own trousers and lay on her covering her mouth with one hand and holding her hands with the other. He then defiled her. It was also her testimony that he had a knife which he showed to her while they were on the road.

9. Her evidence was lent support by that of **PW2** her mother who testified that the incident came to light when she, **PW2** came to visit two days later and found the minor walking with her legs apart. She enquired from the minor what had happened and the minor told her what the appellant had done to her. **PW2** reported the matter to the police.

10. The minor's testimony of sexual penetration was corroborated by the medical evidence tendered by **PW3**, George Maingi, a Clinical Officer at Thika Hospital. **PW3** testified that upon examination of the minor on 29th January 2007, he found that her hymen was broken and she had a whitish discharge. A HVS test revealed no infection or spermatozoa, and she was negative. She had no other physical injuries. **PW3** concluded that there was evidence of penetrative sexual encounter, involving the minor.

11. I therefore find that the minor's testimony was well corroborated by the evidence of **PW2** her mother, as to the state she found the minor in when she arrived home two days later, and the evidence of the medical witness. In any case, by the provision of **Section 124** of the **Evidence Act** there is no special requirement for corroboration of the evidence of a sexual offence victim. The learned trial magistrate believed the minor's evidence because her assailant was her step father a person well known to her, and there was medical evidence to confirm her testimony.

12. I considered the appellant's defence alongside the evidence on record and found that it was untenable. The appellant blamed the minor's mother of fabricating this case to get back at him, for disagreeing with her after he returned from an 8 year sojourn in jail to find that she had gotten children by other men.

13. The learned trial magistrate disbelieved the evidence for reasons that the complainant had no reason to frame the appellant. I respectfully agree with the learned trial magistrate. To believe the appellant would leave the medical evidence concerning the minor unexplained.

14. It is unlikely that if there existed such a serious disagreement between **PW2** and the appellant, as the appellant would have me believe, that **PW2** would release her children to go with the appellant. The minor was subjected to <u>voire dire</u> examination before she testified and the learned trial magistrate observed that she understood the duty of telling the truth. Her testimony was tendered on oath.

15. I further note from the record that her testimony was detailed and graphic and that she withstood the lengthy cross examination from the appellant beautifully. Hardly the kind of testimony and forthrightness which would come from an 11 year old who had been coached.

16. I am satisfied that it is the version of events narrated by the minor which is a true depiction of what

occurred and not the version tendered by the appellant. I wholly agree with the learned trial magistrate that the prosecution witnesses were credible and their evidence was not shaken in any way by the defence story.

For the foregoing reasons I find that the appeal has no merit. I dismiss the appeal uphold the conviction and affirm the sentence imposed by the learned trial magistrate.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **19th day** of **July 2012.**

L. A. ACHODE

JUDGE