



TITO MARSHAL ABONYAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1288 of 2007 in the Chief Magistrate's Court at Thika – Mrs. L. W. Gicheha (SRM) on 5th May 2010)

JUDGMENT

1. Tito Marshal Abony, the appellant herein was tried and convicted for the offence of defilement contrary to **Section 8(1)** of the **Sexual Offences Act No. 3 of 2006** . He was thereafter sentenced to serve 10 years imprisonment in accordance with the law.

2. The chief facts are that on 7th day of March 2007 at around 4.00 p.m. at Thika District of the Central Province, he committed an act which caused penetration with L.W.M. a child under the age of 17 years.

3. In the alternative the appellant was charged with indecent act with a child contrary to **Section 6(a)** of the **Sexual Offences Act No. 3 of 2006**.

4. The appellant has now brought an appeal against both conviction and sentence in which he has advanced several grounds as follows:

(i) The conviction was based on inconsistent and contradictory evidence;

(ii) The prosecution relied on a single witness;

(iii) Section 72(3)(b) was violated;

(iv) The offence was not proved beyond reasonable doubt;

(v) Vital witnesses were not called to testify;

(vi) The court accepted expert evidence by a person other than the maker of the report.

5. Learned Counsel, Mr. Swaka, appearing for the appellant, urged first, that the age of the complainant was not ascertained. **PW3** the complainant's employer had told the court that the complainant was 17 years old when she came to work for him and that she had been in employment for 1½ years, which would make her 18½ years of age, at the time of the assault. The learned counsel urged secondly, that the charge sheet was defective in so far as it failed to describe the means of penetration and to which part of

the complainant's body the said penetration was occasioned.

6. The learned State Counsel Miss Mwanza, conceded the appeal for reasons that there were doubts as to the age of the complainant and the charge sheet was defective in so far as it did not disclose what the appellant used to cause penetration and to what part of the complainant's body he penetrated.

7. On the first ground, it is clear that for the charge of defilement to succeed, the complainant must be aged less than 18 years. It is therefore paramount as stated in **Geoffrey Ogeyo vs Republic Cri. App. 232 of 2009 [2010] eKLR**, **Ben Wambua Makau vs Republic Cri. App 334 of 2008** and **Silas Ogoro Nyakweri vs Republic [2008] eKLR** (unreported), cases to which learned counsel for the appellant referred this court, that the age of the complainant be established through documentary or factual evidence. The complainant's age cannot be said to have been proved when she testified that she was 17 years old and the testimony of her witness placed her at 18½ years of age. It is noted that there was no birth certificate produced in evidence to dispel this doubt.

8. On the second ground the charge sheet merely stated that the appellant:

“committed an act which caused penetration with.....”

I respectfully agree with the learned counsel Mr. Swaka that the charge sheet was defective and violated **Section 3(1)(a) of the Sexual Offences Act**, which demonstrates what amounts to penetration. The charge sheet must be so clear as to leave the accused person in no doubt as to the acts he is accused of perpetrating, and what offence they amounted to.

9. Neither the appellant nor the trial court should be put in an embarrassing situation where they have to guess what the charge sheet intended to state, from the manner in which it was framed. The particulars must be clear because it is against these particulars that the evidence of the prosecution will be evaluated, to establish whether the prosecution's case has been proved against an accused person.

10. For the two reasons stated above, I find that there was sufficient doubt in the prosecution case, and benefit thereof should have operated in the appellant's favour.

11. I therefore allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant by the learned trial magistrate.

It is ordered that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **18th** day of **July 2012**.

L. A. ACHODE

JUDGE