REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 59 OF 2012

JAPHETH ZAKALA IMBANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

(From original conviction and sentence in Criminal Case number 459 of 2009 of the Senior Resident Magistrate's Court Maseno)

The appellant on 13-3-2009 was charged with the offence of defilement of a girl contrary to section 8 (1) of Sexual Ofences Act no. 3 of 2006.

The particulars are that on the 23rd day of March 2006 in Wekhomo location in Emuhaya district of the Western province had carnal knowledge of **PAN** a girl under the age of 16 years. The appellant was convicted and sentenced to serve 15 years imprisonment.

The appellant has appealed to this court citing six grounds in his memorandum of appeal namely:-

1. The learned trial magistrate erred in law by convicting the appellant when the prosecution had entirely failed to prove its case against accused person beyond reasonable doubt.

2. The learned trial magistrate erred in law by convicting the appellant on the weight of evidence that was totally contradictory and conflicting.

3. **The learned trial magistrate erred in lay by convicting the appellant on the basis of suspicion.**

4. The learned trial magistrate erred in law by convicting the accused person without proof of age of the complainant.

5. The learned trial magistrate erred in law by believing the complainant to be a truthful witness when her evidence was contradicted by other prosecution evidence.

6. The trial magistrate was otherwise biased in his judgment.

The brief facts of this case is that on 23-3-2009 the complainant PW1 went to fetch water from a nearby river, having been sent by her mother. The river was close to 100 meters from her home.

Her uncle one **Michael Bonde** who was in the house sleeping requested the complainant to fetch water for him too and she complied.

When she brought the water to her uncle the appellant was present and he told her to get into the house. This is the period he had sexual intercourse with her. The complainant gave a graphic description of how the appellant had sex with her including the use of a condom.

The complainant went home but she did not tell her father. The following day in school she was found in possession of soda which the appellant had bought for her. On inquiry, she told the teacher that the appellant gave it to her after he had sexual intercourse with him.

The teacher after being briefed by the complainant took her to the chief\'s camp at Emuhaya .

PW2 Gideon Olukoye, a teacher at Emulwa primary school told the court of how on 24-3-2009 a bottle of soda "black currant" was brought by one of the teachers called Musumi to him. The complainant told him that the said soda was purchased by the appellant after he had sex with her.

PW3 GNO, the complainant\'s father was summoned by the school deputy headmaster on 24-3-2009 after the discovery of the soda. The witness denied having purchased soda for his daughter and further having any knowledge of the relationship between the appellant and the complainant.

PW4 Grace Adulo, is the Assistant Chief of Ebusundi sub location. She was informed by the deputy headmaster on 25-3-2009 of the incident. After talking to the complainant and taking her to the children officer she demanded that the appellant ought to be apprehended. She ordered PW5 and another to arrest the appellant which they did.

PW6 Joshua Imbande, a clinical officer, produced the P3 form. His evidence after examining the appellant was that complainant had been defiled. **PW7 Cpl Robert Kisilu,** is the investigating officer. He told the court that the appellant was escorted to the station by the Administration Police officers. After carrying out his investigation by interviewing the complainant he decided to charge the appellant.

The appellant gave unsworn evidence. He denied the charge. He however confirmed that he knew the complainant.

When this matter came up for hearing, **Mr. Amondi** counsel for the appellant attacked trial court's judgment and the prosecution case on several fronts. He argued that the charge sheet was defective at it did not indicate that the sexual intercourse was unlawful or not.

He further argued that the complainant's age was not known and that there was no evidence that the soda was purchased by the appellant. He said that 23-3-2009 was a Sunday and therefore not a school day as stated by the complainant.

Mr. Meroka state counsel for the respondent vehemently denied and supported the conviction and sentencing by the trial magistrate. This being a first appeal, this court is enjoined to look at the entire proceedings a fresh and to come up with an independent and an objective finding.

The real issues to determine include whether complainant actually defiled the appellant. Was the single evidence of the complainant sufficient to convict? Did the court deal with extraneous matters?

First of all it is not in dispute that the appellant and the complainant are well known to each other. This is well acknowledged by both parties. Secondly, I have checked in the calender and I do disagree with the appellant\'s counsel that 23-3-2009 was a Sunday. Actually that day was a Monday. It is correct therefore for the complainant to have said that she had left school at 1700 hrs. as it was on a Monday, which is usually a school going day.

The evidence of defilement was that given by the complainant. The complainant said that the appellant

covered her mouth with his hand while he went on with the act. This went on for one hour.

The graphic description of the incident is so clear that one cannot fail to appreciate that the complainant was talking the truth. The incident took place inside the house of the complainant\'s uncle who had sent her to fetch water. The said uncle was asleep in the house. Although there was no evidence on which room the incident occurred, it nevertheless took place in the complainant\'s uncle\'s house.

The appellant had worked for Mr. Michael Bonde for over 20 years. This was never denied. Obviously Mr. Bonde was not called to testify and the incident must have taken place on different room or house.

I find that the complainant could not resist the appellant as she knew him well and further the water she was taking belonged to the appellant\'s boss.

On being cross examined by the appellant the complainant said:-

“I did not tell my father and my uncle because you threatened me”. The complainant further told the court that the accused gave her soda. This is still the same soda that was found with the complainant at school the following day.

I do not find any malice for the complainant to have implicated the appellant in the said ordeal at all. The allegation that the appellant had defiled the complainant three times was not proven. The complainant in her evidence in court did not raise this. It is only PW2 and others who alleged that they had been told by the complainant.

I have had a look at the P3 form and findings therein the same remained unshaken during the trial. The findings of the clinical officer was that the complainant had been defiled.

I agree however with Mr. Amendi that the cause of infection ought to have been clarified. Suffice to say that all that the court needed to establish was proof of defilement.

In regard to the complainant\'s age, it has been suggested by the appellant\'s counsel that the age was not properly ascertained. The complainant told the court that she was 13 years old. He further told the court that she was 14 years old. The P3 form on the other hand indicates the age of the complainant to be 13 years old. Mr. Meroka told the court that at standard 6 in primary school. 13 years is the most probable age of the minor.

My findings are that from whatever angle both the appellant and the respondent approach the complainant is aged below 16 years. This rightfully fall within the age bracket envisaged by section 8 (1) and 8 (3) of the Sexual Offences Act.

In the premises and pursuant to the findings of the clinical officer hold that defilement was committed by the complainant . The appellant confirmed that that evening he was in the household where he worked, that is the complainant\'s uncle\'s place.

Mr. Amendi argued that the charge sheet was defective as it did not indicate the word **“unlawful”.** I respectfully disagree. Section 8(1) of the Sexual Offences Act clearly on its own does not need further clarification as to make it unlawful.

Having concluded that the appellant indeed defiled the complainant, I shall now turn my attention to the sentence. This court committed the appellant and sentenced him to serve 15 years imprisonment.

The Act provides under section 8 (4) (3) that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years”.

Sub section 4 thereof states:-

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment of a term of not less that fifteen years”.

My finding is that the complainant was less that 16 years at the time of the incident. His father talked of 14 years while the complainant and the clinical officer spoke of 13 years. Clearly this was below the age of 16 years. The appellant does not therefore fall under the bracket of 16 – 18 years as envisaged by sub section 4 quoted above.

The trial court seemed to have relied on this sub section at the time of sentencing. This was erroneous. The proper section ought to have been section 3. Pursuant to the provisions of section 382 of the Criminal Procedure Code, I shall interfere with the said sentence. The said section states:-

“Subject to the provision here before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision, summons, warrant charge, proclamation, order judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission or irregularly has occasioned failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”.

I shall reverse the sentence imposed by the trial court against the appellant of 15 years and substitute it with a custodial sentence of 20 years from 9-1-2012. The appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 24th day of September, 2012.

H.K. CHEMITEI
JUDGE

In the presence of:
….....for the state
….....for the appellant
HKC/va