REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 41 OF 2011

LESIIT, J

B.M.M…….....……..…….APPELLANT

VERSUS

REPUBLIC……....…….RESPONDENT

(From Original Criminal Case No.59 of 2011 at Marimanti SPM Court: P. M. Kiama – S.R.M.)

JUDGEMENT

The appellant B.M.M was arraigned before the SRM's Court Marimanti with one count of Defilement contrary to Section 8 (1) & (2) of the Sexual Offences Act No.3 of 2006

"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life"

The appellant filed this appeal through Kimathi Kiara advocate. Initially the appellant has filed an application seeking to be released on bail pending appeal. Having perused the file, the court directed that counsel should argue the appeal instead.

The appellant has raised three grounds of appeal as follows:

"1. The Learned Magistrate erred in law and in facts in convicting the appellant on plea which was not unequivocal,

2. The Learned Magistrate erred in law and facts in failing to find the accused was a minor (child) and of unsound mind before convicting him of the offence of defilement,

3. The Learned Magistrate erred in law and in fact in sentencing the appellant excessively in the circumstances of this case."

The appellant pleaded guilty to the charge, was convicted and subsequently sentenced to life imprisonment. The facts of the case was that the complainant, a girl of 11 years, was going home for

lunch on 18th January 2011 when she met with the appellant and another boy called Mugao. The appellant is said to have pulled the complainant to the bush and defiled her despite pleas by Mugao that he releases the complainant. A P3 form confirming defilement was produced in court.

The appellant, in response to those facts stated; "**The facts are correct**." In mitigation however, the appellant stated that his head had problems. He said he was hit with a jembe. The appellant also said that he was born in 1994 and therefore was 17 years old. The learned trial magistrate decided to send appellant to a Psychiatrist for a mental evaluation. A report signed by **Dr. RICU MWENDA,** a Consultant Psychiatrist was filed in court. In that report the Doctor's conclusion and opinion was twofold. The first opinion was that he suspected Mild Mental Retardation and that further assessment with history from parents and teacher's academic reports was needed to confirm the same.

The second conclusion was that the appellant was fit to plead to the charges but that they should be presented in simple terms and in a language he is conversant with.

The state has conceded the appeal. Mr. Kimathi for the state agreed with Mr. Kiara for the appellant that in view of the doctor's report, the plea ought to have been repeated. Mr. Kimathi submitted that in view of the teachers' report, the appellant was 16 years at the time of plea. Counsel asked for a retrial in line with Mr. Kiara's submission on behalf of the appellant.

I have carefully considered this appeal. In view of the orders I will make here under, I do not wish to delve deeply into the case since this may preempt future cases against or by the appellant on the same facts. Let it suffice for me to state that the learned trial magistrate initially took the plea properly. The learned trial magistrate's response to the appellant's notice to the court that his head had a problem was also the correct one. The learned trial magistrate was correct to investigate the appellant's allegation that his head had a problem. The problem occurred with the manner in which the learned trial magistrate handled the medical report on the appellant.

The Medical Report by Doctor Mwenda put the learned trial magistrate on notice that there was a need to confirm the doctor's initial suspicion after he examined the appellant, that he had mental retardation. That report, in clear terms, put the learned trial magistrate on notice that the report itself was not conclusive. There was need for medical verification of the doctor's prognosis through further interview and or receipt of appellant's past mental history from his parents, and teacher's reports of his academic performance. Without these verifications, the Doctors Report was inconclusive.

Faced with the report, the learned trial magistrate should have made further orders for a complete verification and confirmation of the Medical Report by facilitating the same as required. It was incorrect for the learned trial magistrate to look partially at the doctor's report by proceeding to confirm conviction of the appellant merely because the doctor declared the appellant of sound mind. In fact the doctor did not declare the appellant of sound mind, he said that appellant was fit to plead and gave a condition or a rider that the charges must be presented to the appellant in simple terms and in a language he is conversant with.

The learned trial magistrate may have used a language appellant understood when he took plea. However there is good reason to doubt that he used simple terms sufficiently to enable the appellant, not only to understand the words, but to comprehend the nature of the charges and the material particulars of the allegations made against him.

Whether for reason the appellant's mental status is unknown even to the doctor who examined him, or for reason the charges were not explained to the appellant in simple terms he could fully comprehend, the plea taken from the appellant was equivocal. It ought not be allowed to stand. Consequently I quash the conviction and set aside the sentence.

The proper order to make in this case is for a retrial to be held, which I hereby order. In order to make it easier for the court to have a full and comprehensive Mental Assessment of the Appellant carried out, and proper Age Assessment to be done. I order that the appellant be retried at Meru Chief

Magistrate's court. That being the case he should be held in custody until 31st March 2011 when a plea should be taken from the appellant for the same charge upon the same facts.

Those are the orders of the court.

Dated signed and delivered at Meru this 29th day of March 2011.

LESIIT, J
JUDGE