



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 275 OF 2007**

*(From original conviction and sentence in Criminal Case No. 184 of 2007 of the Principal Magistrate's Court at Nyahururu)*

**J.G.M.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant was charged and convicted of the offence of defilement of a girl under 11 years of age contrary to Section 8(2) of the Sexual Offences Act 2006 (No. 3 of 2006), and was convicted and sentenced to life imprisonment.

Aggrieved both with his conviction and sentence the appellant appealed to this court on seven (7) grounds namely -

**(1) that he pleaded not guilty during the plea.**

**(2) that the trial magistrate erred in law by convicting me without considering that the evidence adduced by PW1 was a single witness evidence.**

**(3) that the trial magistrate still erred in law and fact by convicting me without considering that the vital evidence of the mother of the complainant did not testify before court, however the evidence of PW1 clarified to the court that she was sleeping with other two children who didn't come to testify.**

**(4) that the trial magistrate still erred in law when convicting me without considering that the case was not proved beyond reasonable doubt, due to the fact that the doctor testified that the complainant was infected yet I was not tested to prove if I was suffering from the same.**

**(5) that the trial magistrate still erred in law when convicting me without considering that there was not collaborating evidence which collaborated the evidence of PW1 which could have linked me with the offence.**

**(6) that the trial magistrate erred in law and fact by convicting me without considering my sworn defense due to the fact that I clearly stated that we had a grudge with the mother of the complainant due to the fact that she misbehaved in my home and I divorced her.**

**(7) that the trial magistrate still erred in law when convicting me without considering that the evidence adduced by PW3 who testified before the court that he arrested me**

***without disclosing to the court where he got the information since the who told him didn't testify before court and that leaves the court with a suspended evidence and that would not have rendered to conviction.***

And prayed that on those grounds that -

- (a) his appeal be allowed,***
- (b) the sentence which was harsh be quashed and set aside,***
- (c) be present in court during the hearing of his appeal.***

The appellant was present during the hearing of his appeal.

In his submissions the appellant stated that the whole prosecution arose from a dispute between him and his wife. They quarreled and she deserted him and ran away and married another man. He remained with the children and the charges against him are false.

Mr. Omwenga learned State Counsel, who represented the State conceded to the Appeal. He submitted that the complainant first complained to her mother - but the mother was never called to testify. The Magistrate who took the evidence of the complainant was not the same one who wrote the judgment, and was not competent to comment on the demeanour of the child. The evidence of the clinical officer was that the child was infected with gonorrhoea, but the appellant was not tested for gonorrhoea to ascertain whether the infection came from the appellant. He should have been subjected to an examination.

In addition, counsel submitted the appellant was the father of the child. He should have been charged with the offence of incest and not defilement.

As it is the duty of this court as the first appellate court, I have examined and re-evaluated the evidence of the prosecution. Indeed PW1 described in vivid detail how the Appellant called her to his bed, removed her panty, and "*did bad things to her*" then took her to the sitting room put her on a table, greased her private parts with soap and water and defiled her in the sitting room and took her back to his bedroom and then ordered her to go back to her bedroom, and not to tell anyone.

The complainant also testified that the next day her sister W told her mother - who summoned her and took her to Ol Moran Police Station, and informed the priest at Ol Moran who got the appellant arrested.

Although the mother was present on 12<sup>th</sup> June 2007 when PW1 gave her testimony, the Prosecutor told the court he could not call her because there were other matters which were pending. She subsequently never testified.

PW2 was the officer who took the complainant for medical examination. He testified that the child was eleven (11) years of age, and had said she had been defiled three (3) days earlier.

PW3 was the Clinical Officer who examined the complainant three days after the incident. He examined the girl and found that she had bruised, swollen, and tender labia. The hymen was ruptured. The anterior and posterior vaginal walls were lacerated and tender, with a foul smelling blood discharge from the vagina. On laboratory examination of the discharge the girl was found to be infected with gonorrhoea.

Although under the proviso to Section 124 of the Evidence Act, (*Cap. 80, Laws of Kenya*) the evidence of an alleged victim of a sexual offence may be used to convict an accused person. The court has still to give reasons, why it is satisfied that the alleged victim is telling the truth.

There are gaps in this case which make it unsafe to uphold the conviction and sentence upon the appellant. **Firstly** there seems to be agreement on the age of the victim, the complainant. The charge sheet refers to a girl under 11 years of age (*as of 11<sup>th</sup> January 2007, when the offence was alleged to have been committed*) and the evidence of the complainant (PW1) who said that she was 9 years of age. That age is

certainly under 11 years. What was the girl's age, 9 or 11? The mother who would have shed a little more light on the girl's age was not called. No reason was given. **Secondly** the medical evidence showed that the girl was infected with gonorrhoea but the suspect, the appellant was not subjected to examination. If he were found to be equally infected then it could be said with a degree of certainty that he was the most probable infector of the girl.

**Thirdly**, the victim's own evidence was that she was with her two brothers M and W. His mother and sister had gone out. Is it likely that her father would bring her to a sitting-room apply water and soap to her private parts, defile her and her brother remain asleep? Did she and appellant have the paws of a cat which make little noise when spotting their prey? Little girls are obedient to their parents, why did the victim not even protest and shout and seek help from her two brothers to scare the appellant?

If the appellant is guilty of the deed he was charged, convicted and sentenced, it is in my view for those reasons unsafe to maintain that conviction and sentence against the appellant.

I therefore quash the appellant's conviction, set aside the sentence and order that the appellant be set free unless otherwise lawfully held.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 27<sup>th</sup> day of May 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**