



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CORAM: F. AZANGALALA J.**  
**CRIMINAL APPEAL NO. 171 OF 2009**

**BETWEEN**

**DANIEL MWURA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*[Being an appeal from the Judgment of the Senior Resident Magistrate – N. Shiundu, dated 28th September, 2009 at Eldoret Chief Magistrate’s Court in CRC. No. 1686 of 2009]*

**JUDGMENT**

The appellant, **Daniel Mwaura**, was charged with the principal count of defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. He also faced an alternative count of committing an Indecent Act with a child contrary to section II (1) of the same Act. The principal count carried the following particulars:- that the appellant, on diverse dates between 1<sup>st</sup> November, 2008 and 7<sup>th</sup> March, 2009 at L[...] in Uasin Gishu District within the Rift Valley Province intentionally and unlawfully did cause his penis to penetrate the vagina of **E.W.T** (hereinafter “**the complainant**”) a child aged 11 years.

The particulars of the alternative count were that the appellant, on diverse dates over the same period at the same place intentionally and unlawfully caused his penis to come into contact with the private parts namely, vagina of the complainant.

The appellant pleaded not guilty to both counts and after a full hearing, was convicted of the main count of defilement and sentenced to fifteen (15) years imprisonment by **N. Shiundu**, then a Senior Resident Magistrate at Eldoret.

The appellant was dissatisfied with the conviction and sentence and has appealed to this court on the main grounds that he was convicted on insufficient evidence; that essential witnesses were not called, and that his defence was not considered;. He abandoned his appeal against sentence.

The appeal was opposed by **Mr. Oluoch**, the Learned Senior Deputy Prosecution Counsel, who

submitted that there was overwhelming evidence to support the charge of defilement which, according to counsel, was chronic. With regard to sentence, he urged that the Learned Senior Resident Magistrate had no discretion and should have imposed a Life Sentence which is the only sentence provided in the section under which the appellant was charged.

This is a first appeal. The court is mandated to reconsider and re-evaluate the evidence which was placed before the trial court and arrive at its own independent conclusion as to whether the conviction of the appellant was proper and whether to uphold the sentence imposed. A crucial element to be taken into account is that this court did not see or hear the witnesses testify an advantage which the trial court had and the court should make allowance for that (See **Njoroge –vrs Republic [1987] KLR 19**).

The evidence which the Learned Senior Resident Magistrate accepted was given by four witnesses: **E.W.T** (P.W.2), a girl aged 11 years at the time of the incident, (the complainant), **A.W** (P.W.3), her mother, **P.T**, (P.W.4), her father, P.C. **Doris Shapata** (P.W.4), the arresting officer and **Dr. Joseph Embenzi** (P.W.1) who filled and signed the P.3 form in respect of the complaint.

The complainant was examined by the court (*voire dire*) and was found suitable to give her testimony on oath. She narrated to the court that on 1<sup>st</sup> November, 2008, 1<sup>st</sup> March, 2009, 3<sup>rd</sup> march, 2009, and 7<sup>th</sup> March, 2009, the appellant defiled her. The 1st time, he gave her Kshs 20/= and a Samosa. The second time, he gave her Kshs 200/= and the 3<sup>rd</sup> time, he gave her a condom which she carried to school. The item provoked the school authorities who called her mother (P.W.3).

P.W.3 testified that she was called to the complainant's school on 2<sup>nd</sup> march, 2009 where she found her with biscuits, cakes, Ribena and a packet of condoms which the complainant stated had been given to her by the appellant. The complainant then disclosed that she had been defiled repeatedly by the complainant who was a photo man in their area. P.W.3 and P.W.4 reported to Langas Police Station and then took her to Moi teaching and Referral Hospital where P.W.1 later examined her and completed a P.3 form in respect of the complainant. According to P.W.1, the complainant had a torn hymen and was sexually experienced. He concluded that she had been sexually abused.

P.W.4 issued to the complainant the said P.3 and subsequently arrested the appellant. The appellant was then charged as stated.

Put on his defence, the appellant denied committing the defilement contending that it was a fabrication.

On the evidence placed before the Learned Senior Resident Magistrate and as analyzed above, he concluded that the complainant was a truthful witness. He further found that the appellant was known to her and his identification was not in doubt. The Learned Senior Resident Magistrate also held that the complainant's testimony was consistent and corroborated. Having made those findings, the defence put forward by the appellant was implausible.

I agree with the Learned Senior Resident Magistrate that the evidence of identification of the appellant was watertight. The appellant was the complainant's neighbour and testified that the defilement took place during the day. The complainant's recollection of the defilement was clear. Whereas the charge sheet gave the period of defilement, the complainant specified the dates when the appellant defiled her in his house. Heavy weather was made of the occasions of the defilement but in my view the specification given in the testimony of the complainant did not invalidate the charge particulars.

It was also submitted for the appellant that essential witnesses were not called. The witnesses given in the submissions as having not been called were the school teachers who found the offending items on the complainant. I am unable to agree that the failure to call the teachers weakened the complainant's case. The mother of the complainant (P.W.3) testified that she was called by the school authorities (**Ms Mbote**) when the said offending items were found with the complainant. The evidence in that respect was not challenged in cross-examination. The testimony of the teachers was in my view not critical. It would have added no value to the prosecution case.

Counsel further submitted that the items found with the complainant should have been produced but were not. That aspect of the complainant's testimony and her mother's was not as already stated challenged. In any event, their production would not have added value to the prosecution case.

With regard to the medical evidence adduced by the prosecution, the appellant's counsel submitted that the same did not support the charge. I think that submission was made because of the finding in the P.3 that the complainant was sexually experienced. The submission in my view is misconceived. The prosecution case was that the defilement was chronic and had taken place over a period of time. The complainant herself in fact stated that the defilement occurred on various dates between 1<sup>st</sup> November 2008 and 7<sup>th</sup> March, 2009. That evidence is clearly in consonance with the particulars given in the charge sheet. P.W.1, **Dr. Embenzi**, was categorical that the complainant was sexually experienced which in his opinion showed that she had been sexually abused-which clearly supported the charge.

The last ground of appeal complained about the failure to consider the defence by the Learned Senior Resident Magistrate. As I have already stated above, the appellant said very little in his defence. Apart from the denial, he stated that the charges were a fabrication. Having re-considered, re-evaluated and re-analyzed the evidence, I think the appellant's challenge is not well taken. The evidence adduced by the prosecution especially that of the complainant clearly displaced the defence put forward by the appellant. The Learned Senior Resident Magistrate said as much. In his own words:-

**“The evidence by the prosecution witnesses is consistent and corroborated. I am unable to find any reason why the prosecution witnesses would want to frame the accused”.**

So, clearly the appellant's defence was considered and in my view properly rejected.

In view of the above analysis, I am satisfied that the Learned Senior Resident Magistrate's conviction of the appellant on the principal count of defilement of a girl aged 11 years was safe. The appeal against conviction is dismissed.

On sentence, the section under which the appellant was convicted provides for Life Imprisonment. The Learned Senior Resident Magistrate imposed upon the appellant 15 years. With all due respect to him, he had no discretion at all. The sentence of 15 years is therefore illegal. I am entitled to correct the same notwithstanding that the appellant abandoned the challenge against sentence.

The sentence of imprisonment for 15 years is hereby set aside. The same is substituted with Life Imprisonment.

Save for the correction of the sentence, the appeal has no merit and is dismissed.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS**

**4<sup>TH</sup> DAY OF AUGUST, 2011.**

**F. AZANGALALA**  
**JUDGE**

**Read in the presence of:-**

1. Mr. Limo for the appellant and
2. Mr. Kabaka for the State.

**F. AZANGALALA**  
**JUDGE**  
**4/8/2011**