No. 2949

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 24 OF 2011

DAVID MOMANYI ……..…….……. APPELLANT

-VERSUS-

REPUBLIC ……..…..…….....….. RESPONDENT

JUDGMENT

(Being an appeal from the original conviction and sentence of the Chief Magistrate's court at Kisii, Hon. Njeri Thuku in Criminal Case No. 1134 of 2009 dated on 18th February, 2011.

The appellant, **David Momanyi** was charged before the chief magistrate's court Kisii with two offences under the **Sexual Offences Act**. In the principal count, the Appellant was charged with defilement contrary to **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act.** The Particulars of the offence were that on diverse dates between 11th and 30th May 2009 in Kisii Township in Kisii Central District, the appellant unlawfully penetrated the vagina of D.G. a girl aged 16 years with his penis.

In the alternative count, the appellant was charged with committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars of the offence being that on diverse dates between 11th and 30th May 2009 in Nyanza Province, the Appellant committed an indecent act with D.G. a girl aged 16 years by rubbing his penis against D.G'S buttocks. The appellant entered a plea of not guilty on both counts and the case proceeded to trial.

Prosecution case was that PW1, D.G. is a 16 year old orphan and the complainant. On 11th May 2009, her guardian, J.O.O. **(PW4)** escorted her back to school on the day that the schools were opening. She was a student in Form 2 at N[...] Girls High School. Her guardian aforesaid went to the administration block to pay her school fees. At this juncture, one of the teachers told the complaint that her hair was too long and required to be cut. PW4 gave her kshs.30/- and off she went to Kisii town for a haircut. After the hair cut she came back to school only to find the school gate closed. She had only kshs.80/- on her and her shopping. She had no money thus to go back to her guardian's home. She therefore opted to sell her shopping in order to raise the money required to go home. In the evening she met the Appellant who agreed to take her shopping and give her money in return. He took her to his house and told her to wait. He returned in the night and she asked him for her money but the appellant told her, he would give her the following day. That night, the Appellant told her to remove her panty and he had sexual intercourse with her throughout the night until she fell asleep. On 12th May 2009, the complainant again asked the appellant for the money to go home but he did not give her. She was afraid and did not leave. Later that night the appellant came to his house and forcefully had sexual intercourse with her and in the process told her that it was good to have sex with her and that she should become his wife. The

complainant stayed in the Appellant's house until 30th May, 2009 when a lady came claiming to be the Appellant's wife. This lady assaulted PW1 and she was only rescued by the Appellant's neighbour who let her sleep in her house for the night. The following day the Appellant gave her kshs.120/- and she made her way home.

PW2, **Jackson Murauni** a clinical officer working at Kisii Hospital examined the complainant. He produced the complainant's P3 form which he filled on 3rd June 2009. He had seen wounds around her forehead and behind her head. The complainant's hymen was torn and her vagina had a foul smell. He did not estimate the victim's age as this was already been filled in the P3 form by the officer who referred the victim to him. Because of the torn hymen he concluded penetration had been achieved.

PW3, **Millicent Wagogo,** the investigating officer of the case was at her place of work at Kisii police station on 1st June 2009 when the complainant and her guardian came to report all that had happened to the complainant. She recorded their statements and issued the complainant with a P3 form. She then caused the arrest of the appellant whom the complainant identified. She claimed that the complainant was 16 years old based on what the victim told her. She confirmed however, that she did not visit the crime scene nor had she called for any documentation to establish the complainant's age.

PW4, J.O. the complainant's uncle and guardian confirmed that the complainant was his late sister's daughter and he shared the responsibility of raising her up with his siblings. It was his first time to take her back to school on the material day. When she asked him for money to cut her hair, he gave her kshs.30/- and they parted ways as he continued following up the administration process in school. Soon thereafter it rained and when done with the school administration, he left for home. He later called the school and found that the complainant was not in school.He then reported her missing to the police. On 30th May, 2009 however the complainant re-surfaced at home and then they both went to the police station. The complainant never told him about sexual encounters with the appellant. He denied under cross-examination, receiving any money on the complainant's behalf but later acknowledged he was given kshs.30,000/- He added that the complainant looks like a child and not an adult.

Put on his defence, the appellant give a sworn statement and had four witnesses to call. In the end, only three testified for the defence.

The appellant told the court that he met the complainant on 11th May 2009 whom he described as ***'Ben's friend'*. Ben** is a person he used to work with. He testified that she told him she had been chased from school because of fees and was looking for **Ben's** help. He took her to **Ben's** house but found it locked and they were told that **Ben** had gone to a funeral and so they went to his house and the appellant asked his neighbour to host her for the night. He went on to say that he gave her kshs.300/- as bus fare. He also stated that he was married and had been since January 2009. He admitted that there was an agreement for his family to pay the complainant's family kshs.30,000/-. He denied having sex with the complainant though.

DW2, N.K described herself as the appellant's wife and had been married to him since January 2009. She described their marriage as 'come-we-stay'. She testified that she met the complainant twice when she came asking for her husband. She also said that she had lived with the appellant throughout and he sometimes slept at his place of work. She told the court that the complainant never gave her any reason why she was looking for the appellant. Otherwise the neighbours knew them as husband and wife even though they had not visited their respective parents.

DW3, L.M. **,** the appellant's mother confirmed that the appellant was married to DW2 and had been for the previous two years. She produced as an exhibit a copy of the agreement she entered into with the complainant's uncle (PW4) whom she paid kshs.30,000/-. She entered into the agreement so that her son could be released.

The learned magistrate having carefully evaluated the evidence on record and the law returned the verdict in favour of the prosecution. She accordingly convicted the appellant of the main count and

thereafter sentenced him to fifteen years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal alleging that the prosecution case was not proved beyond reasonable doubt, that the trial magistrate analyzed and evaluated the respondent's evidence separately, the trial magistrate failed to approach her judgment with an impartial judicial mind and hence the failure to take cognizance of the material discrepancies apparent in the evidence tendered by the respondent's witnesses and finally, the trial magistrate erred in law in failing to consider and or disregarding the appellant's submission and thus arrived at a conclusion contrary to law and weight of evidence on record.

When the appeal came before me for plenary hearing on 30th June, 2011, **Mr. Ochoki** learned counsel for the appellant submitted orally that, the age of the complainant was not established, the circumstances under which the offence was committed were incredible and finally, that the trial court failed to consider the evidence of defence witnesses and in particular DW2, the wife of the appellant.

Mr. Gitonga, learned State Counsel conceded to the appeal on the grounds that the age of the complainant was not assessed medically and secondly, some comments made by the trial magistrate in the judgment were prejudicial to the Appellant.

There is no doubt at all that the age of the victim of defilement under the **Sexual Offences Act** is a critical consideration. Indeed it is a necessary ingredient when an accused is faced with the offence of defilement since the gravity of the sentence depends on the age of the victim. It thus behoves the prosecution to prove the age of the victim to the highest decree possible. Under **section 8** of the **Sexual offence Act,** an accurate assessment of the age of the victim is a material factor in charging, convicting and sentencing. Failure to ascertain the age of the victim with credible evidence such as birth certificate and or age assessment certificate may lead to the conclusion that the evidence led is inadequate to sustain a conviction for the offence of defilement under the **Sexual Offences Act.** Accordingly, age of a victim is a matter of fundamental importance under the **Sexual Offences Act.** It cannot be taken for granted. It must be specifically proved as aforesaid failing which the charge shall be deemed unproved.

In this case there was no specific proof of the complainant's age. Whereas she herself claimed to be 16 years old, she was nonetheless not certain. The same goes for the evidence of her guardian on the issue. As for the clinical officer, he relied on the information provided by the police officer who issued the complainant with the P3. He merely estimated her age. He never conducted an age assessment. The court also appreciated the critical factor of age assessment. This is how it delivered itself on the issue:- ***"…The court takes Judicial Notice that a student in Form 1 is under 18 years old therefore in the eyes of the law is a child. The victim said she is an orphan and her uncle confirmed this fact. However, this court cannot speculate over why her age was not proved by documentation. One final point to note is that the court had an opportunity to see the victim when she testified. I found her truthful and that her body has physically matured, she has the face of a child".***

Obviously, the foregoing observations of the learned magistrate are loaded with gross misdirections in law and assumptions. There is no room in criminal proceedings for assumptions by way of Judicial Notice or otherwise.

The age of victim of a sexual violence and in particular, defilement has to be proved by credible and cogent evidence. It cannot be proved by taking Judicial Notice of the fact that a form 1 student must automatically be 18 years old or below. There are exceptional cases where we have seen old mothers joining primary schools as well as secondary schools to advance their education. Similarly, it cannot be the basis for a conviction merely because the court has looked at the victim and is persuaded and or forms an opinion that though the victim is grown in body, she nonetheless wears a baby face.

For all the foregoing reasons, I am satisfied that the appellant was wrongly convicted. Accordingly, his appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 23rd day of September, 2011

ASIKE – MAKHANDIA
JUDGE