REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL APPEAL NO. 42 OF 2009

DANIEL LATIM.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from the original conviction and sentence by T.A. Odera – RM

in Criminal Case No. 807 of 2007 delivered on 17th July, 2009 at Kitale.)

J U D G M E N T.

1. The appellant **DANIEL LATIM** was charged with the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the 9th day of March, 2007 at around 2.00 p.m. in Trans Nzoia district within Rift Valley Province by use of genital organ caused penetration into genital organ of **P.W,** a child aged 14 years. After the evidence of two witnesses the prosecution applied to substitute the charge, although the appellant objected, the learned trial magistrate allowed the prosecution to substitute the charge and the appellant was charged with a substituted charge.

2. According to the substituted charge, the appellant was charged with the offence of defilement of a child with mental disability contrary to section 7 of Sexual Offences Act No. 3 of 2006. The particulars of the charge stated that on the 9th day of March, 2007 in Trans Nzoia East district within Rift Valley province caused penetration of his genital organ (namely penis) into the genital organ namely vagina of **P.W** who has mental disability. On the alternative charge the appellant was charged with the offence of indecent assault of a child with mental disability contrary to section 7 of Sexual Offences Act No. 3 of 2006. The particulars of the charge stated that on the 9th day of March, 2007 in Tans Nzoia East district within Rift Valley province unlawfully and intentionally caused the contact of his genital organ (namely penis and the genital organ namely buttocks, breasts, vagina) of **P.W** who has mental disability. The appellant pleaded not guilty to the charges on both charge sheets. After trial he was found guilty and upon conviction he was sentenced to 20 years imprisonment on the main charge.

3. Being aggrieved with the conviction and sentence, the appellant filed this appeal which challenges the conviction on the grounds that the evidence by the prosecution did not meet the required threshold. The appellant has also faulted the prosecution's evidence especially the document ally evidence adduced by a clinical officer who failed to give the age assessment and the medical condition of the complainant. The appellant also contends that the learned trial magistrate failed to consider his defence statement which was plausible because there was a ranging dispute and acrimony between the appellant and PW2 over a love affair that had gone sour. The appellant also filed very lengthy written submissions in support of the

appeal.

4. The state conceded to this appeal; **Mr. Onderi,** the learned Snr. Principal State Counsel submitted that there are glaring irregularities in the proceedings. Firstly the appellant requested to be furnished with the charge sheet and the witness statements. The learned trial magistrate made an order to that effect and the appellant was given 2 charge sheets. The court clarified that the correct charge sheet was the one dated 12th March, 2007. In that charge sheet, the appellant was charged with the offence of defilement contrary to section 8 (2) of the Sexual Offences Act. The appellant is convicted of the offence of defilement of a child with mental disability contrary to section 7 of the Sexual Offences Act.

5. The other irregularity that was highlighted by the State is regarding the application by the prosecution to substitute the charge from that of defilement contrary to section 8 (2) of the Sexual Offences Act to that of defilement of a child with mental disability contrary to section 7 of the Sexual Offences Act. The record of proceedings show the appellant objected, but he was overruled by the court. A fresh charge was read to him on 24th November, 2008. By the time the charge was substituted, two witnesses had testified. The record shows these witnesses were never recalled for cross examination on the offences stated in the substituted charge sheet. It is the evidence of PW1 and PW2 which led to the conviction of the appellant, they were therefore crucial witnesses. PW1 and PW2 were intermediaries because the victim was mentally challenged. The evidence by the clinical officer was conclusive that the complainant's hymen was broken and she was pregnant. The court should have ordered for a DNA test to ascertain the paternity of the child. For those reason the state conceded to this appeal.

6. This being a first appeal, this court is mandated to reconsider and re -evaluate the evidence before the trial court so as to arrive at its own independent determination on whether or not to uphold the conviction and sentence by the trial court. In so doing the court should bear in mind that it never heard or saw the witnesses as they testified and give due allowance for that. I now wish to set out albeit briefly the evidence that was before the trial court which led to the conviction and sentence of the appellant.

7. The complainant in this case did not testify, according to **J.N.K** PW1. The complainant was aged 14 years but the she was born with a mental disability. On 9th March, 2007, at about 1.30 p.m. the complainant went to another plot and left PW1 resting at home. Shortly thereafter PW1 heard people screaming and when she went out to inquire, she was informed that her daughter was found in the house of the appellant and the crowd told her that they found the appellant defiling her. By that time the complainant was outside the appellant's house and the appellant had been locked inside his house by members of the public.

8. PW1 sent someone to report the matter at a nearby police post and police officers from the Sibanga police post visited the scene. **PC Nickson Kimeli** (PW3) who was attached to Sibanga patrol base visited the scene. He found a crowd of people gathered outside the appellant's house. On enquiry he was told the appellant had defiled a mentally challenged child. He arrested the appellant and issued the complainant with a P3 form. The complainant was examined by **Linus Ligala,** a clinical officer attached to Kitale District Hospital. He confirmed that the complainant was mentally challenged. Upon the examination of the complainant's private parts, he found her hymen was freshly torn. The complainant was also pregnant; he referred her to the VCT clinic.

9. The other evidence was by **S.N (PW2)**, a neighbor of the complainant and PW1. She testified that on 9th March, 2007 at about 1.30 p.m., she was sitting outside with other ladies where she sells sugarcane. PW1 enquired from the ladies the owner of the house where the complainant had entered. Apparently it was the wife of the appellant who confirmed that the appellant was in the house with the complainant. PW1 walked towards her house and while passing the appellant's house, she heard the complainant screaming. PW2 screamed and the other people came to see what was happening. They entered the appellant's house and found him lying on top of the appellant. The members of public closed the house from outside while the appellant was inside and the mother of the complainant was called.

10. The appellant was put on his defence. He gave unsworn statement of defence and denied having committed the offence. He alleged that he was implicated by PW2 with whom he had a grudge because they used to have a love affair which went sour. The appellant owed PW2 three tins of maize and sugarcane worth Ksh. 10/= When the appellant was unable to pay PW2, she threatened him with dire consequences.

11. The learned trial magistrate evaluated the above evidence and made the following findings:-

"Accused also raised the issue of the victim being found pregnant by PW4 at the time of examination and that the age of pregnancy was not stated on this point firstly, the clinical officer (PW4) indicated that the victims hymen was freshly torn and for that reason, I find that the person who tore the hymen is the one responsible for the pregnancy.

In any event, it is not an ingredient of the offence of defilement that the victim must be a virgin or not pregnant. In the foregoing circumstances, I proceed to dismiss the defence as a mere denial as there is overwhelming evidence adduced against accused. I find that prosecution have adduced firm, clear and well corroborated evidence to show that accused was found in the act of defiling P.W a child aged 14 years old who is mentally challenged.

Prosecutions have proved their case against accused beyond any reasonable doubt. I find accused guilty of defilement of a child with mental disability contrary to section 7 of the Sexual Offences Act No. 3 of 2006.

I proceed to convict him of the said offence under section 215 of the Criminal Procedure Code."

12. The complainant in this case was a vulnerable witness and according to section 31 (1) of the Sexual Offences Act, a court can declare a witness a vulnerable witness. In this case PW1, the mother of the complainant should have been declared an intermediary witness for the complainant who is mentally challenged. Although the court did not comply with the provisions of section 31 of the Sexual Offences Act, in my opinion that is not a material anomaly. What is critical is the fact that on 24th November, 2008 the prosecution substituted the charge from that of defilement to defilement of a mentally disabled child and the court did not recall the witnesses who had testified for cross examination. Section 214 of the Criminal Procedure Code provides that at any stage of a trial, before the close of the prosecution's case, if it appears to the court that the charge is defective either in substance or in form, the court may make such orders for the alteration of the charge either by the way of amendment or by the substitution or addition of a new charge as the circumstances of the case will require
Provided;
(i) …

"(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination"

13. It is obvious in this case the appellant had objected to the substitution of the charge but he was overruled by the court, thus in the interest of justice and for a fair trial, it was necessary to allow the appellant cross examine the witnesses who had testified. The fact that the proceedings also show when the appellant was furnished with two charge sheets the court clarified the correct charge sheet was the one dated 12th March, 2007, did not help the matter. These are fundamental flaws in the trial of the appellant and I agree with the learned state counsel, the conviction of the appellant is not safe.

14. Should the conviction be quashed and the appellant referred for a retrial, the Court of Appeal set out the principles to guide the court on whether or not to order a retrial. In the case of **Ahmed Sumar vs. Republic [1964] EA 481, at page 483** the court held as follows:-

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered."

15. There was overwhelming evidence against the appellant who was found in the act of defilement of a child who is mentally challenged by PW2. The complainant is a vulnerable witness, a child who is mentally challenged. However, this is not a suitable case for retrial. I have also taken into consideration the fact that the appellant was in custody for about 3 years before he was finally convicted on 17th July, 2009. Upon conviction, he has served about 2 years of the sentence, although that may not be sufficient punishment for the heinous offence, he has hopefully learnt a lesson about sexual offences that will deter him. For the above reasons, the conviction is quashed and the sentence of 20 years is set aside. The appellant is to be released forthwith unless he is otherwise lawfully held.

Judgment read and signed on 22nd day of September, 2011.

MARTHA KOOME.

JUDGE.