REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 108 OF 2009

(Being an appeal from original conviction and sentence of the SRM's court at Keroka in criminal case No. 77 of 2009 - Were, SRM)

BETWEEN

SAMWEL MOBEGI NYANKABARI …….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

JUDGMENT

The appellant was charged with defilement contrary to **section 8 (1)**as read with**section 8 (4)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars of the offence are that on 11th January 2009, in Borabu District within NyanzaProvince, the appellant intentionally and unlawfully committed an act that caused penetration with his genital organ to E.M., a girl aged 16 years. When the charge was first read out on 15th January, 2009, the appellant pleaded guilty to the same. In mitigation he told the trial court that his mother had died and he wanted to marry the girl. She had told him that she was 19 years old. The trial court ordered that the complainant's age be assessed and a Psychiatric checkup be done at MasabaDistrictHospital before sentence could be passed on 19th January, 2009. On that day, no age assessment report was handed to the trial court and neither was a Psychiatric report availed as ordered. The appellant changed his mind and requested that the charge be read to him again which was done. He pleaded not guilty to the same. He was thereafter tried, convicted and sentenced to 15 years' imprisonment.

Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to this court. He stated that the learned trial magistrate erred in law and fact by convicting him without sufficient evidence. He also stated that the sentence imposed was harsh and excessive.

During the hearing of the appeal, the appellant opted to rely on the record of appeal and did not make any submissions.

Mr. Gitonga, State Counsel, submitted that the appellant's conviction was well founded in law and the sentence that was passed was the minimum one and urged the court to dismiss the appeal in its entirety.

The first appellate court is enjoined to consider afresh the evidence that was adduced before the trial court, evaluate the same and reach its own conclusion. See **OKENO –VS- REPUBLIC** [1972] E.A. 32. The evidence that was adduced before the trial court may be summarized as hereunder:

The complainant, **PW1**, told the court that she was 16 years old. She testified under oath and stated that on 11th January 2009, she went to visit her aunt known as **P** at N. While there she went to church and on her way back she met the appellant who requested her to

accompany him to their home. She agreed and accompanied him. He took her to a certain house. He locked her there and went away. He returned at about 7.00 p.m. He prepared some eggs and the two had them for dinner. They undressed and slept. They had consensual sexual intercourse. In the morning the appellant left and the complainant remained in the house again. He asked her to wait for him until he comes back. He returned at about 7.00 p.m. He made eggs again and thereafter they went to bed. The complainant remained in that house for four days. Her cousins started looking for her and eventually found her in the house. They apprehended the appellant and took him to the police.

In cross examination, the complainant said that the appellant had requested her to marry him. To that she had responded … **"if you take me don't lock me in the house."**

The complainant's cousin known as **F.B, PW3,** testified that the complainant went to visit her on 11th January 2007. At about 9.00 a.m. she left to go to church but did not return. She began to make enquiries and she was informed that the complainant had been seen with the appellant. She looked for the appellant and asked him whether he knew where the girl was. He promised to show her where she was but shortly thereafter disappeared. She sent some people to the house of the appellant and they confirmed that PW1 was inside. PW3 said that the complainant was mentally retarded and was attending special school.

Joel Ongaro, PW4, a Clinical Officer at MasabaDistrictHospital examined the complainant on 17th January, 2009. He had been informed that the girl had been defiled by a person known to her. Upon examination, he found that her genitalia was normal and she had neither bruises nor lacerations.

When the appellant was put on his defence, he opted not to give any evidence. The actual age of a complainant in a case of defilement is very important because if the court convicts an accused, the sentence is determined by the age of the victim.
The trial ordered that the complainant be subjected to age assessment and Psychiatric test but that was not done. The only document that referred to the complainant's age was the P3 form which was filled by PW4 before the appellant was charged. The police had already estimated the complainant's age as 16 years and that is the same age that was estimated by PW4.
Simply put, the prosecution failed to comply with the trial court's order issued on 15th January, 2009. Court orders are not issued in vain, they should be complied with.

On the first day when the appellant was arraigned in court, he said that the complainant told him that she was 19 years old and he wanted to marry her. The complainant also said that the appellant had proposed to marry her. It is instructive that it is the appellant's allegation that the complainant told him that she was 19 years old that caused the trial court to order that the complainant under goes an age assessment.

Under **section 8 (5)** of the **Sexual Offences Act**, it is a defence to a charge of defilement if it is proved that a child deceived the accused into believing that she was over the age of eighteen years at the time of the alleged commission of the offence and the accused reasonably believed her.

In the absence of an age assessment report and given the circumstances under which the offence was committed and the conduct of both the appellant and the complainant, the appellant's conviction was not safe.

I allow the appeal, quash the conviction and set aside the sentence that was passed by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF JULY, 2010.

D. MUSINGA
JUDGE.

22/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the state

Appellant present

Court: Judgment delivered in open court on 22nd July, 2010.

D. MUSINGA
JUDGE.