REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 106 of 2009

(From Original Conviction and Sentence in Criminal Case No. 378 of 2008 the Senior Resident Magistrate's Court at Kaloleni: ***Andayi – W.F. – S.R.M.)***

JOHN MAZERA JIMMY ....…...…..........….. APPELLANT

VERSUS

REPUBLIC …………………..…………...……………... RESPONDENT

JUDGMENT

The Appellant **JOHN MAZERA JIMMY** filed this appeal against his conviction and sentence on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) AS READ WITH SECTION 8(2) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were that

> ***"On the diverse dates between 29th July 2008 and 2nd August 2008 at K n village M location in Kaloleni District within Coast Province, unlawfully and intentionally committed an act which caused penetration of his male genital organ into a female genital organ namely vagina of A.J. a child aged 11 years"***

The Appellant denied the charges and his trial commenced on 15th December 2008. The prosecution called a total of six (6) witnesses in support of their case. The brief facts were that on 29th July 2008 the Appellant was in M where the complainant **A J** **PW1**, a child aged 11 years lived with her family. The Appellant was looking for a housegirl. The complainant who had been sent away from school due to lack of a uniform decided to take up the job as she wished to raise money to purchase her uniform and be able to return to school. The Appellant went with the complainant to his home. When they arrived the Appellant suggested that instead of sharing a bed with his children which was too small, the complainant should share his bed. She slept at the far end of the bed but during the night the Appellant put his legs around her waist and pulled her towards himself and had sexual intercourse with her. After the act he offered her bhang to smoke which the complainant declined. The Appellant continued with this trend of defiling the complainant for a period of four nights. One morning when the Appellant left for his work place in the sand quarry **PW1** ran away to seek help. She met the chief and told him of her ordeal. She was taken to Rabai Health Centre and examined. That night she slept at the chief's home. The following day the Appellant was arrested and taken to Mariakani Police Station. He was later charged with this offence.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he totally denied defiling the complainant. On 25th June 2009 the learned trial magistrate delivered his judgement in which he convicted the Appellant and after listening to his mitigation sentenced him to serve twenty (20) years imprisonment. Being dissatisfied with both his conviction and sentence the Appellant filed this present appeal. The Appellant who was unrepresented at the hearing of his appeal chose to rely entirely upon his written submissions which had duly been filed in court. **MR. ONDARI**, learned State Counsel made oral submissions by which he conceded the appeal. I have carefully perused the written submissions filed by the Appellant which apart from largely being Biblical quotations raised the following two grounds of appeal

- § Insufficiency of evidence
- § Failure by the expert witness to produce his report

I will dispose of his second ground first. The Appellant submits that it was wrong for a police officer to adduce evidence on behalf of a professional. The police officer who testified in these proceedings was **PC ALICE YAILE** **PW4**. Whilst this witness did refer in her evidence to the complainant's P3 form, she did not by any means testify in the place of the maker who was the doctor. **PW4** merely identified the P3 form and had it marked for identification. She gave no evidence regarding the findings in the report. The professional who made the report and who was qualified to produce the same as the maker was **PW5** **BILDAD NJOROGE**, a clinical officer based at Mariakani District Hospital. It is **PW4** who testified with regard to his examination of the complainant and further gave evidence with respect to the medical findings. Therefore the Appellant's submissions are clearly misleading as the doctor did infact testify and did produce his report which was marked as **Pexb3**. It is incorrect to state that a police officer testified on his behalf. This ground of the appeal has no merit and I hereby dismiss the same.

I shall now proceed to deal with the Appellant's first ground of appeal. The complainant told the court that when she went to the Appellant's home to work as a housegirl he tricked her into sleeping in his bed and proceeded to defile her for four (4) days. Not surprisingly there was no eyewitness to this defilement. The complainant was examined by **PW5** a doctor who was unable to corroborate her evidence on defilement. In his evidence at page 22 line 16 **PW5** states

> ***"I had no conclusion that there was penetration as there were no spermatozoa found in her genitalia"***

Penetration is a key element of proof in cases of defilement. Without proof of penetration (even partial penetration) then this offence cannot stand proven. The learned trial magistrate proceeded to convict the Appellant notwithstanding this lack of corroboration. My view is that he erred in so doing. I find that the Appellant' conviction on a charge of defilement had no basis and as such I do quash that conviction.

Mr. Ondari for the State submitted that he would concede the appeal due to the fact that the Appellant was not charged with any alternative offence to defilement. I have perused the charge sheet. I do note that no alternative charge was laid against the Appellant. However S. 4 of the second schedule to the Sexual Offences Act provides

"(4) Section 186 of the Criminal Procedure Code is repealed and replaced with the following new section –

> ***186 When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it"***

This section clearly provides that notwithstanding the fact that one has not been charged with a particular offence, the court may nevertheless proceed to convict a suspect of any of the offences provided for in the Sexual Offences Act so long as that court is satisfied that the facts of the case do reveal that particular offence. With this in mind I have considered whether the facts of this case do provide proof of the commission of any other offence under the Sexual Offences Act.

The complainant in her evidence told the court that the Appellant defiled her each night for a period of four(4) days before she managed to escape. The fact that the complainant had gone to the Appellant's home to work as a househelp is not in any doubt. This fact is admitted to by the Appellant in his defence. The complainant only worked for the Appellant for a period of four (4) days before she left his home. The complainant did inform the first person she met on leaving the Appellant's home that she had been defiled. **PW6 DENA BEMBUCHE MWANGOLO**, tells the court that she met the complainant on 2nd August 2008 at about 8.00 A.M. near the water point. The child was crying. In the words of **PW6** this is what the complainant told her page 24 line 1

> ***"They asked me to listen to the child. I asked her the problem. She told me she had come from Kilifi, K area, her home and was brought there by J M to work as a househelp. She had been brought the previous Sunday. That day John forced her to make sexual intercourse with her [sic] but she declined. But on Monday, while she was asleep, he had sexual intercourse with her. She therefore wanted me to assist her with Kshs.200/- as fare to go back to her home."***

The narration which the complainant gave to **PW6** about her ordeal corresponds exactly to what she told the court in her evidence in chief. This rules out the possibility that the complainant had fabricated this story as a mere afterthought. In his judgement at page J3 line 33 the learned trial magistrate makes the following remarks with respect to the complainant

> ***"I am satisfied that the complainant is a consistent and honest witness. She has nothing against the accused person that would cause her to consent to some lies and accuse him of such serious offence. I find that she spoke the truth and her evidence is reliable"***

The learned trial magistrate had the advantage of actually hearing and seeing the complainant as she testified. He was therefore best placed to comment on her demeanor. I find no reason to fault these observations.

PW6 after hearing the complainant's story took her to the Assistant Chief. **PW2 A CJ**, the Assistant Chief did testify before the lower court and confirmed that a child of about 11 years old was brought to him and she alleged she had been defiled. He noted that the child was ***"bleeding"***. The child named one ***"JM"*** as the man who had defiled her. **PW2** accommodated the complainant in his home for the night. The following day he took her to the police station. **PW3 APC LODIO SAMANI** confirms that the complainant was brought to report her case. He saw her and he observed that page 15 line 7

> ***"The child was quiet and did not even talk to us. She was slow in her walking"***

PW2 together with **PW3** went to the quarry where the Appellant worked and arrested him. From this evidence it is quite clear that the complainant had been subjected to a sexual assault. She told her tale to several witnesses with no deviation

and no inconsistencies. The witnesses who saw her clearly noted that she was bleeding and had difficulty walking. This only goes to further prove her claim that she had been defiled.

The complainant identified the Appellant as the man who raped her. She had traveled with him from her home to his home and she had lived in his house for four (4) days as a househelp. She had more than ample time and opportunity to see and positively identify the Appellant. The complainant also identified the complainant by name. She did give his name to both **PW2** and **PW3** when she reported the matter to them. There is no doubt that the complainant knew the Appellant well. Indeed as I have stated earlier the Appellant himself concedes in his defence that the complainant worked in his house for four (4) days. Thus this is not mere visual identification. This is evidence of recognition which has been held to be far more reliable than mere visual identification **[ANJONONI –VS- REPUBLIC [1980] KLR 59**. I am therefore satisfied that there has been clear positive and reliable identification of the Appellant with no room for error.

The fact that the complainant was a minor is also not in doubt. She herself told the court that she was eleven (11) years old. **PW2** also gave her age as 11 years. In the P3 report the doctor estimated the complainant's age to be 11 years. The learned trial magistrate did address the issue of the complainant's age at page J2 line 22 thus

> ***"I have carefully considered the evidence by the prosecution witnesses and the testimony by the accused person in defence. The issues for determination are whether the complainant is a child and whether the accused had sexual intercourse with her. On the first issue, the complainant did not know her date of birth but said she was 11 years old. She had no document such as birth certificate to support her evidence. However, she is evident of her age. Her physical appearance, stature and general demeanour in court clearly showed that she was a very young girl. This evidence is supported by the clinical officer and all the other prosecution witnesses who described her as a young girl. I am satisfied that she was about eleven years old as she said"***

Once again I find no reason to doubt or dismiss these findings of the trial magistrate. As stated earlier it was he who saw and heard the witnesses testify and had the mandate to make comments on the appearance of the complainant. I therefore uphold this finding that the complainant was 11 years old.

From my own analysis of the evidence adduced before the trial court I am satisfied that the complainant endured an Indecent Assault of a sexual nature at the hands of the Appellant. The facts prove an offence under S. 11(1) of the Sexual Offences Act which provides:-

> ***"11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years"***

Relying on the provisions of S. 186 of paragraph 2(4) of the Transitional Clauses in the First Schedule of the Sexual Offences Act I do hereby substitute a conviction for Indecent Assault with a child.

The learned trial magistrate sentenced the Appellant to serve twenty (20) years imprisonment. This sentence is excessive in the circumstances. S. 11(1) provides for a minimum sentence of ten (10) years. I do hereby set aside the twenty (20) year sentence imposed by the lower court and substitute instead a sentence of ten (10) years imprisonment. This appeal therefore fails. The Appellant to serve ten (10) years in prison.

Dated and Delivered in Mombasa this 3rd day of August 2010.

M. ODERO

<u>JUDGE</u>

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

M. ODERO

<u>JUDGE</u>

3/08/2010