**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**

**Criminal Appeal 258 of 2008**

*(From Original Conviction and Sentence in Criminal Case No.4016 of 2007 of the Chief Magistrate's Court at Mombasa:* ***C.W. Mwangi – C.M.)***

**ROBERT KABWERE KITI ……..... APPELLANT**
**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **ROBERT KABWERE KITI**, has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned in court on 18th December 2007 and charged with **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(2) OF THE SEXUAL OFFENCES ACT**. The Appellant faced an alternative charge of **INDECENT ACT CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT.** The particulars of the offence were that

> ***"Between 10th and 11th December 2007 at unknown time at S Y area in Mombasa District within Coast Province, committed an act which causes penetration with a child namely H K a girl aged 8 years"***

The Appellant denied the charges and his trial commenced on 13th February 2008. The prosecution led by **INSPECTOR NDUBI** called a total of five (5) witnesses in support of their case. The facts in brief as narrated by the complainant a child aged 7 years were that the Appellant was offered accommodation in their home by her father. On 10th December 2007 the complainant and her brother were asleep on the bed. The Appellant was sleeping on the ground. The Appellant climbed onto the bed and blocked her mouth. He undressed her and proceeded to defile her. The next day 11th December 2007 the Appellant raped her again. One of the complainant's teachers noticed that she was walking with difficulty and questioned her. The complainant confessed what had occurred. The matter was reported to police. The complainant was taken to Coast General Hospital for examination. The Appellant was arrested and later charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the charges. On 17th April 2008 the learned trial magistrate delivered his judgement in which he convicted the Appellant on the main charge. He was later sentenced to life

imprisonment. Being dissatisfied with both his conviction and sentence the Appellant filed this appeal.

The Appellant who was not represented at the hearing of this appeal relied on his written submissions which had been duly filed with leave of the court. **MR. ONSERIO**, learned State Counsel appeared for the Respondent State and gave oral submissions in opposition to the appeal. As a court of first appeal I am mindful of my obligation to re-examine and re-evaluate the evidence adduced before the lower court [see **OKENO –VS- REPUBLIC [1972] EALR 81**].

The Appellant has in his written submissions raised several grounds for this appeal the main ones of which include

- § Violation of his constitution rights as guaranteed by S. 72(3) of the (former) Constitution of Kenya
- § Insufficiency of Evidence
- § Failure by some witnesses to testify
- § Failure by the trial court to consider his evidence

With respect to the first ground the Appellant submits that he was held in police custody for a period of seven (7) days before being arraigned in court, a fact which he contends nullified his trial, as it amounted to a violation of his Constitutional Rights as guaranteed by S. 72(3) of the previous Constitution of Kenya. It is important to note that at the time the Appellant's trial was conducted, the previous constitution was in force and it is this that I will be considering in determining this particular ground of appeal. S. 72(3) of the Constitution provided that a suspect who has been arrested on suspicion of having committed a non-capital offence shall be arraigned before a court within twenty-four 24 hours of his arrest. The Appellant claims that contrary to these provisions he was detained in police custody for a period of seven (7) days after his arrest. This allegation is borne out by the record of the proceedings from the lower court. The Appellant was arrested on 11th December 2007 but his first court appearance was on 18th December 2007 a full seven (7) days after the date of his arrest. The question then is whether any delay beyond this 24 hour constitutional period amounts to a violation of pre-trial rights which would entitle the Appellant to an automatic acquittal. This indeed is a question which the courts in this country have had to grapple with in several instances. Whilst in case of **ALBANUS MWASIA MUTUA –VS- REPUBLIC CRIM APPEAL 120/2004** it was held that any unexplained violation of this constitutional right would result to an automatic acquittal irrespective of the nature or strength of evidence adduced before the court. However this decision was later overruled in the later case of **ELIUD NYAGA –VS- REPUBLIC CRIM APPEAL 182 OF 2006**, the Court of Appeal held as follows:-

> ***"while we would reiterate the position that under the fair-trial provisions of the constitution, an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal"***

It is important for a court to weigh any breach of the pre-trial rights of an accused person as against the public policy interest in having all reported offences investigated and tried to their logical conclusion. The key consideration in my view would be whether the delay complained of was so inordinate as to amount to a denial to a fair trial. This was not the case here. The delay was only six (6) days beyond the 24 hour period. The police would have needed to have both the complainant and Appellant examined by medical personnel, which conceivably would require more than 24 hours. On the whole I find this delay not to have been inordinate in the circumstances and thus the delay would not render the Appellant's whole trial a nullity. I therefore dismiss this ground of the appeal.

I will now proceed to consider the question of whether the evidence adduced before the lower court was sufficient

to warrant a conviction against the Appellant. The complainant who was a child aged 7 years gave sworn evidence after the trial magistrate conducted a ***'voire dire'*** examination and found her to be possessed of sufficient intelligence to understand the nature of an oath. The Appellant in his written submissions took issue with this ***'voire dire'*** examination arguing that the trial magistrate did not properly examine the child. The law requires that where a child of tender years is to be called as a witness, the trial court must conduct a ***'voire dire'*** examination of such child. In the case of **JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445**, the Court of Appeal held as follows

***"(1) Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a 'voire dire' examination, whether the child understands the nature of an oath in which event his sworn evidence may be received …."***

***(2) It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided"***

I find that the learned trial magistrate did comply fully with the above provisions. The record indicates at page 3 that the child was properly examined and her answers to the questions put to her are on record. The trial court then made its ruling

***"Court – this minor understands the proceedings and is competent to testify"***

From the above I am satisfied that the trial magistrate did properly and procedurally conduct a voire dire examination on the child. His finding was that the minor understood the proceedings and could give sworn evidence. Upon my own assessment of the complainant's responses she struck me as a particularly bright and intelligent child. I have no doubt that she fully understood the nature of an oath. I therefore agree with the decision of the learned trial magistrate to allow the complainant to give sworn evidence.

The Appellant was charged with the offence of Defilement. Thus raise two key questions. Firstly, was the Appellant defiled as she alleged? Secondly, was it the Appellant who committed this act of defilement against the complainant?

With respect to the first question the complainant gave a graphic and detailed description of what befell her in her evidence in chief. At page 3 line 20 the complainant states

***"The accused removed my clothes. He removed his penis and inserted it into my vagina."***

This does not strike me as a fanciful tale woven by an overly imaginative 7 year old. The complainant was clearly describing events that actually happened to her. Defilement being an offence of a sexual nature and therefore one often done in secret, it is not surprising that there were no eye-witnesses to the act. The complainant explained that her brother with whom she shared a bed was fast asleep. However corroboration is provided by the evidence of **PW2 J W,** who was the principal of the school which the complainant attended. She told the court that on 11th December 2007 she noticed that the complainant was withdrawn and was having trouble walking. She called the child aside and questioned her. The complainant revealed to her that she had been defiled. **PW2** went further and physically examined the complainant. She noted injuries on her private parts. **PW2** then reported the matter to the village elder and later to the police.

Yet further corroboration is provided by the medical evidence adduced by **PW5 DR LAWRENCE NGONI** who is a medical officer at Coast General Hospital. He states that he examined the complainant on 11th December 2007. He noted that her hymen had been raptured and the external genitalia were swollen. His conclusion was that she had been defiled. He filled and signed her P3 form which he produces before the court as an exhibit **Pexb2**. This witness was categorical that penetration had occurred. Indeed he states at page 10 line 14

> ***"… there was penetration which was caused by a blunt object"***

At this point I wish to note that a male penis fits the description of a blunt object.

The complainant did also herself report her ordeal to her father **Z G PW3**, and to a lady she refers to as ***"m K".*** The Appellant made much of the fact that the prosecution failed to call the said M K as a witness. This failure is not in my view fatal to the prosecution case. The prosecution is only required by law to call such witnesses as may be necessary to prove their case. They are under no obligation to call each and every person mentioned in the proceedings. The complainant's own sworn testimony coupled with the evidence of **PW2** and the medical evidence in my view sufficiently proves the fact that the complainant was defiled as she alleged. I do so find.

The next crucial question is the identity of her assailant. The complainant states that it was the Appellant whom she names as ***'Dunga'*** who defiled her. She tells the court that on the material day the Appellant was being accommodated in their house. At page 4 line 4 under cross-examination by the Appellant the complainant states categorically

> ***"I know you. You are called Dunga. My father brought you so that you could stay in our house. You did not have your house. You were sleeping down on the floor …."***

**PW3** the complainant's father confirms that the Appellant was staying in his house. The Appellant in his defence does not deny this fact. It is clear therefore that the Appellant was a person well known to the complainant as he was living in their home. She knew him by name. Indeed upon being questioned by **PW2** the complainant told her that it was ***'Dunga'*** who had defiled her. The complainant though a young child gave her evidence in a clear and consistent manner. She positively identified the Appellant in the lower court and she remained unshaken under rigorous cross-examination by the Appellant. At page 4 line 16 she asserts

> ***"You were the one who inserted your penis into my vagina"***

In his judgement the learned trial magistrate took note of and recorded the body language of the complainant. At page 17 line 18 he wrote

> ***"When the minor testified she was able to demonstrate what the accused did to her on the bed and infact she was disturbed and did not want to even look at the accused person"***

The complainant's reaction towards the Appellant indicates that she had undergone an unpleasant experience at his hands. I am satisfied that the complainant made a clear and positive identification of the Appellant whom she knew very well. It has been held severally that evidence of recognition is far much more reliable than visual identification alone [see **ANJONONI –VS- REPUBLIC [ 1980] KLR 59**]. I find that the identification of the Appellant as the man who

defiled the complainant is positive and reliable with no room for error. The complainant was a very young child aged only 7 years. The offence of Defilement contrary to S. 8(2) of the Sexual Offences Act was sufficiently proved in the lower court. The conviction of the Appellant for this offence was sound both in law and fact and I have no hesitation in upholding the same.

The Appellant was given an opportunity to mitigate after which he was sentenced to life imprisonment. This is the only sentence provided for by S. 8(2) of the Sexual Offences Act. I find the sentence to have been lawful and appropriate given that the Appellant abused the hospitality of his host and took advantage of his young daughter in the vilest way possible. I do hereby confirm this sentence of life imprisonment. The upshot is that this appeal fails in its entirety and is hereby dismissed.

**Dated and Delivered in Mombasa this 15th day of September 2010.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

**M. ODERO**

**JUDGE**

**15/09/2010**