



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CRIMINAL APPEAL NO.150 OF 2009**

(Appeal arising from Cr. no.968 of 2009)

PAUL BETHUEL WESONGA
 :::: **APPELLANT**

~VRS~

REPUBLIC
 :::: **RESPONDENT**

JUDGMENT

The Appellant Paul Bethuel Wesonga was convicted by Bungoma Senior Resident Magistrate of the offence of defilement of a child contrary to section 8 (1) of the Sexual Offences Act no.3 of 2006 and sentenced to ten (10) years imprisonment with hard labour. In his amended petition of appeal, the Appellant relies on seven grounds all of which challenge the evidence of the prosecution on the basis that the offence was not proved beyond reasonable doubt.

The state conceded to the appeal. The State Counsel Mrs. Letting submitted that the evidence has major contradictions and gaps which all considered would not sustain a conviction. The medical evidence was not consistent with the rest of the evidence on record. The dates when the victim was examined by the doctor differed as between the victim (PW1) and the mother (PW3).

On perusal of the evidence, I note that PW1 said that after she was defiled, there was blood oozing from her private parts. She wore her under pants and went home. On reaching home, she changed the pants. According to her, the pants she wore after changing was the one produced before the court. PW3 her mother contradicted PW1’s evidence on the exhibit produced in court. PW3 said that the exhibit was the one PW1 wore at the time she was defiled.

PW1 in cross-examination said that she was examined on 30/04/2009. The incident had occurred on 25/04/2009. PW3 testified that she came to know that her daughter PW1 had been sexually assaulted on 28/04/2009. The village elder PW2 said that the incident was reported to him by PW3 on the 01/05/2009 when he advised PW3 to take her daughter for medical examination. This is the same date that PW3 reported the matter to police.

PW4 is not the one who examined the complainant although he filled the P.3 form. There was no cogent evidence of sexual assault on the complainant. The medical examination was done about six (6) days after the incident and it was unlikely that it would bear any fruit. At the time the incident was reported the age of the complainant was found to be 14 years on examination.

In his judgment, the trial magistrate said that he had found the evidence of the complainant to be consistent with the medical evidence. I find this conclusion to be incorrect given the facts analysed in the foregoing paragraphs. The court found that the case had been proved beyond any reasonable doubt which

finding was not supported by the evidence.

I find that the conviction was against the weight of the evidence. This appeal must therefore succeed. I agree with the State Counsel that this is not a good case for retrial due to the contradictory and unreliable evidence. The conviction is therefore quashed and sentence set aside. The accused is set at liberty unless otherwise lawfully held.

**F. N. MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma this 27th day of October, 2010 in the presence of the Appellant, Mr. Situma for Imuene and the State Counsel Mrs. Leting.

**F. N. MUCHEMI
JUDGE**