(From original conviction and in Criminal Case No. 940 of 2007 sentence of the Senior Resident Magistrate's Court at Kilifi before Mr. C. Obulutsa – SRM)

W.H.C……..APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

J U D G M E N T

WHC (hereinafter referred to as the appellant) was convicted on a charge of defilement of a girl contrary to section 8(3) of the Sexual Offence Act No. 3 of 2006 and sentenced to a 20 year jail term.

He faced a second charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

The prosecution case was based on particulars to the effect that on 12th day of August 2007 at about 7.00pm, in Kilifi District, wilfully and unlawfully had carnal knowledge of S.N.

The evidence of S.N (PW1) which was unsworn was that on 12-8-07 she was at her grandmother's home where there was a funeral. She was playing with her sister P, when the appellant who was known to them as *B* approached them and offered to buy them sodas. She went with him along the road, then he kicked her down and inserted his manhood inside her. The incident took place at 7.00pm and PW1 said it was dark. He gave PW1, Ksh 50/- which she gave to her father and told him what had happened.

She said appellant was their neighbour. On cross-examination she stated:

"***You also put your fingers into my private parts"***

Her sister P aged 6 also gave unsworn testimony and recalled that one day while at her grandmother's home, the appellant left with PW1 to buy sodas and that PW1 returned with Ksh. 50/-. She too referred to appellant as *B* who was their neighbour. M.N, the girl's mother says PW2 informed her that "Mr. B and S.N had gone to the shop"

She left to look for them, but did not find them. Later PW1 turned up saying she was defiled and given Ksh 50/-.

PW5 P.N (the children's father) gave evidence similar to PW2. The matter was reported to police and the ksh. 50/- handed over to them. However, no items of clothing were handed over to the police.

Susan was examined by Dr. Mutinda (PW3) who found that she had a laceration on the perineum and a cut hymen and there was a small bloody discharge. She had an infection and was assessed to be 13 years old. The duly filled P3 form was produced as exhibit. On cross-examination the doctor said that he did not see spermatozoa.

Appellant in his unsworn testimony confirmed that he knew PW1 as he was working for them. He had a dispute with PW1's father over some payments for work done and he reported the matter to the chief and PW5was summoned and the chief gave a date. When they returned, PW5 said he would have the appellant jailed and on 1-8-07 he was arrested and charged.

The learned trial magistrate in his judgment noted that the parties were known to each other. He observed that appellant in his defence, did not address himself to what PW1 and PW2 said and that from the evidence of the two girls and that of the doctor confirmed that PW1 was aged 13 years and had been sexually assaulted.

He took into account PW2's evidence that PW1 had left accompanied by the appellant (whom she knew) to go to buy sodas and he believed that the witness was telling the truth.

The learned trial magistrate sought to rely on the provisions of section 124 of the Evidence Act in finding that he believed the child was telling the truth as PW1 said she was given Ksh. 50/- after the incident, and when she got home she still had the money. His finding was that appellant's defence did not cast any doubt in the prosecution evidence.

Appellant was dissatisfied with these findings and appealed on grounds that:

(1) He was convicted on insufficient evidence.

(2) The learned trial magistrate erred in relying on the evidence of PW1 in the belief that it was free from the possibility of error.

(3) The prosecution case was prematurely investigated and the learned trial magistrate failed to consider the doctor's evidence which did not prove that it was appellant who was connected to the offence.

(4) The 20 year sentence imposed on him was manifestly harsh and excessive.

Appellant filed written submissions in which he stated that the charge sheet was defective as PW1 evidence regarding his date of arrest does not tally with what is shown on the OB – whereas PW1 said he was arrested on 13-8-07 yet OB shows date of arrest as 17-8-07 and that in fact the evidence of PW1 and PW6 as adduced in court was different and so the charge is defective and he should be acquitted. He draws from the decision of **Alexander Nyachio V R Cr App. 1590 of 1984** where the court stated that:

"***There should be no MATERIAL discrepancies between evidence given to police and evidence given to court."***

So what date had PW1 told police that appellant was arrested? Is this discrepancy material to the nature of charge the appellant faces? Does this make the charge defective?

Mr. Ogoti (counsel for the State) submits that the same does not make the charge sheet defective as the charge is properly drawn. This submission is misplaced and should perhaps be considered under the ground for contradictory evidence by prosecution witnesses. I have perused the charge sheet and find it properly drawn and compliant with the provision of section 137 Criminal Procedure Code.

Appellant also argues that the learned trial magistrate failed to sign the record after entering his plea and that such failure renders the entire proceedings a nullity. He further points out that even when PW3 was cross examined the trial magistrate did not sign that part of the record and he cites the provisions of section 197 Criminal Procedure Code which requires that upon recording the evidence of each witness the trial magistrate should sign against such record.

To this, Mr. Ogoti's response is that the proceedings were taken in the magistrate's own hand and the omission does not nullify the proceedings.

I have looked at the original handwritten record. It clearly bears the trial magistrate's signature after recording the appellant's plea. As regards evidence of PW3 on cross-examination, I also confirm that the original handwritten record clearly shows the learned trial magistrate appended his signature, so that ground has no leg on which to stand.

Appellant also contests the complainant's age saying there was no age assessment done and that the learned trial magistrate erred by relying on the contents of the P3 form. He cited the decision in **Musikiri V R Cr. App. No. 20 of 1986** where the court stated that

"***it would have been desirable to seek better evidence as to age of the complainant, such as medical assessment of the age on birth certificate before making a finding".***

I must point out here that appellant has selected to cite only a short paragraph in this decision without giving the whole background. This is a decision I am familiar with and I know that the background is this was borne by the fact that the trial court had relied only on evidence of the complainant's mother regarding age.

In reply to this ground, Mr. Ogoti submitted that it is Dr. Mutinda who filled the P3 form and gave the age assessment as 13 years – surely that is evidence by a medical personal regarding age assessment and so that ground too cannot hold.

Appellant also argues that the doctor's evidence was inconclusive because she said there was no spermatozoa traced when complainant was examined and that the rest of the findings about a torn hymen were rendered a sham by that observation. Mr. Ogoti in opposing this ground submitted that the doctor's evidence was very conclusive and very detailed and he stated very clearly that the hymen was cut and this when considered along with the evidence of PW1 showed corroboration. Does the presence or absence of spermatozoa prove defilement?

Section 8(1) of the Sexual Offences Act states:

"***A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"***

This clearly means that it is not the presence or absence of spermatozoa or whatever other body fluids that proves defilement, it is the act of penetrating – and it was PW1's evidence that appellant inserted his genitals into her's and this finds support in the cut bleeding hymen observed by the doctor.

Appellant also faulted the decision by the trial magistrate that PW1 could testify, saying the trial magistrate did not make a finding that PW1 was possessed of sufficient intelligence to justify reception of her evidence or that she understood the duty of speaking the truth. He referred to the provisions of section 19(1) of the Oaths and Statutory Declarations Act which sets out the procedure a court should adopt.

Mr. Ogoti's response was that *voire dire* examination was duly carried out in respect of PW1 and PW2 and that it was therefore after that the children were directed to testify. I confirm that section 19 of the Oaths and Statutory Declarations Act gives a very elaborate process to be adopted by a court when faced with a child witness and that this was not wholly adopted by the trial magistrate. So does that render the entire evidence of PW1 and PW2 a nullity?

The record shows that PW1 was examined. She stated inter-alia:-

"…***aged 13 years in Standard 4, Christian I am aware of the importance of telling the truth. I do not understand an oath"***

From this then, the trial magistrate established from the witness that she understood the importance of telling the truth and this alone salvages the situation. The same procedure was not adopted in respect of

PW2 who gave unsworn evidence – even if her evidence was to be expunged from the record due to non compliance with the legal provisions cited, that would not alter the prosecution's evidence, which finds corroboration in evidence of the father and mother that PW1 actually had Ksh. 50/- with her and gave its source as the appellant.

Appellant also stated that the trial magistrate did not comply with provisions of section 169 Criminal Procedure Code, which require the trial magistrate to specify in the judgement, the offence for which one is convicted. Mr. Ogoti pointed out that the typed record of the trial court clearly stated that appellant was convicted on the main charge of defilement. It would of course be desirable to state clearly that accused is thus convicted on the charge of defilement contrary to section 8(1) of the Sexual Offences Act", yet this omission is not fatal and finds redemption at the beginning of the judgment where the trial magistrate clearly stated which charges appellant faced and that one was a main charge (for which he was convicted and indeed he stated)

"***The accused is found guilty and convicted on the main count of defilement"*** and it was thus clear what offence appellant was convicted on and there is nothing to warrant this court interfering with the finding on that ground.

Appellant also raised the issue of violation of his constitutional rights under section 72(3) (b) of the constitution saying that he was held in police custody for seven days, and on the basis of **Albunus Mwasia Mutua V R** case, Cr. App. 120 of 2004, he should be set at liberty no matter what the evidence in support of the prosecution case is. This stems from the fact that PW1 claimed he was arrested on 13-8-07 – (PW1) is the child), - and that this is coupled with the evidence of PW6, the police officer Pc Konde who said that appellant was taken to the police station on 13-8-07. The record shows the appellant was taken to court on 20-8-07 – which confirms his complaint of being held beyond 24 hours, in fact for seven (7) days. The prosecution offered no explanation for the delay, so should this result in an automatic acquittal. I am fully alive to the many Court of Appeal decisions regarding delay as violation of rights under section 72(3) (b) of the Constitution, yet I pause to consider whether the Constitution demands an automatic acquittal as the only remedy?

To my mind it appears that case law has developed that practice, yet each situation must be considered on its own merits. Indeed even the **Albanus Mutua** case recognised that there may well be an explanation for the delay and went on to cite instances where such delay may arise and be accepted as a good explanation.

However in the present instance, there is no explanation for the delay and I make a finding that beyond the proper period of twenty four hours during which the appellant could have been detained prior to being charged, he was held for seven days and since no explanation has been proffered for the delay, the same was wrongful and indeed breached the appellant constitutional rights. What then is the next step?

Let me borrow from my brother Hon. Justice Ojwang J in **Msc. Cr. App. No. 722 of 2007 Evanson K. Chege V R** which I will paraphrase this:

"***Appellant has urged that there exists an attrition – chain to legal validity, which starts with delayed arraignment in court rendering the charge null, a null charge rendering the trial process null, a null trial process rendering the eventual verdict itself null … The juristic basis for this syllogism has not been cogently presented, if the courts had legal obligation to apply the syllogism, their task would be all too easy, but the ideal justice is unlikely to be found embedded in the easiest options.***

The Constitution itself has a provision in section 72(6) for compensation for breaches of trial rights and that is the remedy I find appropriate, available and constitutionally recognised and available to the appellant and he has the right to pursue for such compensation.

Was the sentence harsh and excessive – section 8(3) of Sexual Offences Act provides that upon conviction where the child is aged between 13-15 years the sentence shall not be less than 20 years – so the sentence was within the law even if it appears harsh. The upshot is that the conviction was safe and I

uphold it.

The sentence was legal and it is thus confirmed.

The appeal is dismissed.

Delivered and dated this **28th** day of **May 2009** at Malindi.

H. A. Omondi

JUDGE