(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO. 61 OF 2007 SENTENCE OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILIFI CRIMINAL CASE NO.103/07 SENTENCE BY MR OBULUTSA SRM)

W.N.G……..……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

W.N.G (the appellant) was convicted on a charge of defilement of a girl contrary to section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 15 years imprisonment.

The appellant denied the charge, prosecution called a total of six witnesses to support the charge which stated that on 19th day of December 2006 at Kilifi District of the Coast Province, he willfully and unlawfully had carnal knowledge of S.M a girl aged 5 years. He had been charged with an alternative being indecent assault with a child contrary to section 5(1) of the Sexual Offences Act, No. 3 of 2006 for which the particulars were identical to the main charge and he was acquitted on the alternative.

The appellant lived with the complainant and her parents and was therefore known to the child S.M. S.M (PW2) told the trial court, that while at home alone, the appellant got there, undressed her and put his penis into her private parts, thereby injuring her.

Her mother D complained having left the child at home with the appellant (who is her in-law while she went to work. The next morning while washing the child, she noticed that she had a wound on her private parts and upon checking she saw a cut. The child said she had been defiled by the appellant. The child was taken to hospital and Dr. Mutua Otieno (PW1) who examined her confirmed that she was five years old and had a perforated hymen. The duly filled P3 form was produced as exhibit.

A report was made to Pc Sarah (PW6) of Kilifi Police Station and she arrested the appellant.

In his sworn defence, the appellant told the trial magistrate that the complainant is his niece and that he was at a wedding at Madaman from 18-12-06 and remained there beyond Christmas. It was reported that money had disappeared at home, and he was accused of stealing it and he had to refund it. When he returned to Kilifi, he was arrested for another case and charged.

In his judgment, the trial magistrate noted that complainant and appellant were known to each other and that the examination by the doctor showed the child's hymen was perforated and that the child was assessed and found to be five years old.

The learned trial magistrate took into account that the child had been left in the company of the appellant. As regards appellant's alibi defence, the trial magistrate held that it did not stand as the child's mother confirmed leaving appellant at home with the child and that it gave the appellant the opportunity to commit the act. The trial magistrate further considered that although the child was only five years old, she was able to give evidence and explain what happened credibly and that was in fact consistent with the

medical findings. The trial magistrate was thus satisfied that appellant had carnal knowledge of S.M.

Appellant was aggrieved by these findings and appealed on grounds that:

1) The learned trial magistrate erred in law and fact by convicting the appellant without seeing the identification at the alleged scene was not conclusive for positive identification as

(a) The crime was alleged to be a room and no explanation was given as to whether the room had windows and was therefore dark.

(b) The duration of time the victim kept the attacker under observation was not disclosed.

2) The child was not subjected to voire dire examination.

3) That the evidence was contradictory and full of material discrepancies.

4) That the learned trial magistrate relied on hearsay evidence to convict him.

5) That the age of the complainant was highly in doubt.

6) The learned trial magistrate failed to consider that his statement of defence remained strong and unshaken.

In his written submission, the appellant states that the charge sheet is defective because whereas PW3 claimed to have reported the matter the next day, the OB shows the report was made in January as per the OB number shown in the charge sheet as 25/8/1/07. Just how this makes the charge sheet defective is not clear to me and I am unable to comprehend the relevance of the cited case of **Tekerali and others v R VoL 19-1952 EACA pg 259** which addressed the question of evidence of first report. I think that case of accused on the content of the first report vis-à-vis the testimony being given in court to test the credibility and truthfulness of the witness.

Although the appeal is opposed, Mr. Naulikha for the State did not address me on this point. What I find is that applicant has misapprehended the principle enunciated in both that case and the case of **Yongo v R (1983) KLR pg 319** and so his argument on that point is completely misplaced.

It is appellant's contention that the entire case is based on fabrications because it is not clear how the report reached the police – that can hardly be – the evidence clearly shows PW3 first went and informed F.M about the incident, her husband PW4 C.K was informed in the evening and the complainant's parents then went and made a report to Pc Sarah at Kilifi Police Station. Either the appellant is mixed up or he is deliberately trying to create confusion as regards the State of the evidence in record. Is there a contradiction in the dates referred to by PW3 – did she mention 20-12-06 as the day she learnt about the incident? No her evidence as this:

"***On 18-12-06, …I returned at mid-day, the next morning while washing her…she said she had a wound on her private parts. I checked and saw a cut. I informed a fellow lady and her father, took her to hospital and to police"***

That definitely is the morning of 19-12-06 and that is confirmed by evidence of PW4 and PW5 who referred to 19th December 2007 as the date they got the information regarding the incident. I have checked the hand whether record and confirm that the date recorded is 19-12-06 (it seems initially it read 07), then the trial magistrate corrected and wrote over the 07 to read 06. However the year in request to PW5 evidence read 19-12-07 and all I can say is that this must have been an error on the face of the record by the trial magistrate as all the witnesses referred to 2006 – that does not make the witnesses liars as suggested by the appellant. The reference to 20-12-06 is in an answer by PW3 on cross-examination when she stated that they went to hospital on 20-12-06.

Surely what does appellant mean to say by the submission regarding his arrest and citing section 150 of the Evidence Act. The record clearly shows he was arrested when he attended court in relation to another case which he had. Whether the person who effected arrest or not testified occasioned no prejudice at all and did not affect the material particulars. There would be no basis whatsoever for the trial magistrate to invoke section 150 of the Criminal Procedure Code and that alone does not make the conviction unsafe – there was no doubt to be cleared so as to warrant summary whoever it was that arrested appellant – he was in fact arrested and charged. Appellant submits that the doctor's evidence should not be given much weight as he was not sworn. I have again checked the handwritten proceedings and confirm that the doctor was not sworn – does that invalidate his evidence? No, it only means that his evidence would have to be taken with caution – I suspect he may have been sworn but the trial magistrate inadvertently failed to record that and only indicated that he was an adult Christian. There are some grounds which appeal raised but did not submit on such as the age of the child and the voire dire examination. May be he realized that those were misplaced grounds as the doctor (PW1) did assess the child's age as five years and the learned trial magistrate carried out an examination of the child to test her ability to testify and whether she understood the meaning of an oath.

Appellant's defence was in fact considered and found to be dented by the prosecution evidence, courtesy of PW3 who said she had left him at her house with the child. The learned trial magistrate fulfilled the requirements of section 124 of the Evidence Act as he noted that no one else witnessed the incident (so PW2 was a sole child witness) but he found her evidence to be consistent and credible bonus by the fact that what she said was actually confirmed by the doctor's findings upon examination – I cannot fault that my finding is that the conviction was safe and I have no reason to interfere with it.

Appellant was sentenced to 15 years, I notice that in his defence he claimed to be 17 years. I don't see any evidence of the learned trial magistrate calling for his age assessment report before sentence. Under the Children's Act No. 8 of 2003 section 2 (which is the interpretation section) "***child means any human being under the age of eighteen years)***

Section 190(1) of the said Act provides that no child shall be ordered to imprisonment or be placed in a detention camp and so before addressing the issue of sentence, I directed the Officer In-charge Malindi G.K. Prison to make arrangements for the appellant to be escorted to Malindi District Hospital for age assessment and a report has been filed in this court which is dated 21-7-09 and signed by Dr. Ang'a of Malindi District hospital placed appellant's age at about 18 years. Appellant was sentenced on 18-4-07 which means at the time he was definitely below 18 years and therefore should not have been given an imprisonment then. To that extent then I interfere with the 15 year imprisonment meted out by setting it aside. I substitute the same with an order that the Probation Officer Malindi do confirm the availability of a vacancy in a Borstal Institution or a Vocational Training Institute within the next 14 days and matter be mentioned on 6-8-09.

Delivered and dated this **27th** day of **July 2009** at Malindi.

H. A. OMONDI

JUDGE