



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

Criminal Appeal 220 of 2007

K M.M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, kMM, was charged in the Senior Resident Magistrate's court at Kaloleni with two counts of defilement of a girl contrary to section 8 (4) of the Sexual Offences Act No. 3 of 2006. the particulars of the first count were that, the appellant, on 21st September 2006 in Kilifi District within Coast Province, intentionally and unlawfully caused penetration with genital organs to R.M.M (hereinafter "the complainant"), a girl aged 16 years. The second main count carried the following facts: that on 27th January 2007, in Kilifi District within Coast Province, the appellant intentionally and unlawfully caused penetration with genital organs to R.M.M, a girl aged 16th years.

The appellant also faced alternative offences of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act 2006.

The appellant appeared before W. F. Andayi, then a Senior Resident Magistrate on 19th February 2007 and pleaded not guilty. The Learned Senior Resident Magistrate then entered a plea of not guilty and after a full trial convicted the appellant on the main counts of defilement of a child aged 16 years and sentenced him to ten (10) years imprisonment.

Being dissatisfied with the conviction and sentence the appellant has appealed to this court on six (6) grounds which, in the main, challenge his conviction on the uncorroborated testimony of the complainant and on insufficient evidence.

When the appeal came up for hearing before me on 13th July 2009, the appellant relied upon written submissions which elaborate his grounds of appeal. Mr. Onserio, Learned counsel for the Republic opposed the appeal contending that corroboration was not necessary in Law to found a conviction and that the appellant was convicted on proper and sufficient evidence adduced by the prosecution before the trial magistrate.

This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence which was adduced before the Learned Senior Resident Magistrate and come to its own independent finding bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. (See **Okeno – v – Republic [1972] E.A. 32**).

The case of the prosecution was that on 29th September 2006 and 27th January 2007, the complainant, who was then aged 16 years, was defiled by the appellant who was her maternal grandfather. On the first occasion the appellant called the complainant to his house, pulled her onto his bed, removed her panties and had sexual intercourse with her as she cried. The complainant told no one of the incident. On the second occasion, the appellant chased the complainant saying he would kill her. As he did so, she fell down and the appellant pulled her to the back of his house, picked a spear and threatened to kill her. He held her by the neck and removed her underpants. He then had sexual intercourse with her. He carried her to his house and locked her from outside. The complainant however escaped from the house and fled to her grandmother to whom she reported the incident. In the company of her grandmother, she reported to the police, (PW 3), who issued her with a P3 form which was subsequently completed by Mwakio Mwanyumba, PW 4.

PW 2, F.M.M was at the time of trial aged 11 years. After conducting a *voire dire*, the Learned Senior Resident Magistrate concluded that she understood the meaning of an oath and took her evidence on oath. She testified that on the 21st of a month she could not recall, the complainant had informed her of a sexual encounter with the appellant. On another occasion the appellant enquired about the whereabouts of the complainant who had gone for a short call. She called her and the appellant threatened to kill somebody with a spear. PW 2 ran away to her mother to whom she reported the incident. The complainant also joined her after her escape and told them that she had been beaten by the appellant. The trio then reported to PW 2's grandfather to whom the incident was reported.

PW 3, PC Richard Mwalimu, received the complainant's report on 31st January 2007 and issued her with a P3 and summoned the appellant whom he arrested and charged as already stated. In his unsworn testimony the appellant denied the offence.

Upon analyzing the evidence of both the prosecution and that of the appellant, the Learned Senior Resident Magistrate found the appellant guilty as charged, convicted him and sentenced him to ten (10) years imprisonment. I have gone over the record in detail and note that the appellant was convicted mainly on the evidence of the complainant. The complainant testified of two separate defilement incidents. The date of the first incident is not clear. The charge stated that the incident occurred on 21st September 2006, but the complainant testified of 27th September 2006 and 29th September 2006. In her testimony in chief, the complainant stated that the incident occurred as PW 2, her aunt and others were asleep. After the incident, the complainant did not immediately complain to any one of the people who were alleged to be asleep. She gave no reason why she failed to do so while testifying in chief. It was only when challenged in cross examination that she stated that the appellant had warned her not to tell anyone of the incident.

The second incident allegedly occurred on 27th January 2007 when, according to the complainant, the appellant chased her telling her he would kill her. He threatened her with a spear. She fell down and the appellant pulled her to the back of his house where he had sexual intercourse with her. Later, he carried her to the house and locked her from outside. The complainant escaped and ran to her grandmother to whom she narrated the ordeal. She informed her that she would report to the police which she says she did the following day which would be 28th January 2007. That evidence was in conflict with that of PC. Richard Mwalimu who testified that he received the complainant's report on 31st January 2007.

The decision to report to the police after the 2nd incident was made by the complainant. If the complainant could report to the police on her own volition, after the 2nd incident, the reason for failure to report the first incident sounds rather unconvincing. Further, she testified that she reported to the police the following day after the 2nd incident which as already stated fell on 28th January 2007 when, according to her, she was issued with a P3 form. Why did she not go for medical examination on that day when she was allegedly having difficulties swallowing saliva? She also testified that she first went to a clinic at Kwa Karema and later to Mariakani Hospital. It is significant that no medical evidence of the treatment received at Kwa Karema clinic was adduced which evidence, in my view, would have been more relevant than the subsequent testimony of PW 4, Mwakio Mwanyumba. The latter's evidence was

categorical that “*there was no evidence to support the allegation of sexual assault.*”

The above discrepancies were not considered by the Learned Senior Resident Magistrate. I have no doubt in my mind that had the Learned Magistrate considered the same, he would not have found it safe to convict the appellant on the uncorroborated testimony of the complainant. On my part and after analyzing the evidence which was presented before the Learned trial Magistrate, I have come to the conclusion that the conviction of the appellant was unsafe.

In the premises, I allow this appeal, quash the appellant’s conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the State.

F. AZANGALALA

JUDGE

27TH OCTOBER 2009