**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MALINDI**
**Criminal Appeal 16 of 2009**

**ALEX MENZA GONA………………………......APPELLANT**

**=VERSUS=**

**REPUBLIC……………………………….........RESPONDENT**

**JUDGEMENT**

Alex Menza Gona(the appellant) was convicted on a charge of defilement contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006. The prosecution case was based on the particulars that on the 13th day of October 2006 within Malindi District of the Coast Province, committed defilement causing penetration with a child namely MY of thirteen years.

He faced a second charge of compelled or induced indecent act contrary to section 6 (9) of the Sexual Offences Act, No. 3 of 2006, that on the 13th day of October 2006 at Malindi Township intentionally and unlawfully compelled or induced or caused M.Y, a girl aged thirteen years to engage in an indecent act with him.

Appellant denied the charge and after due trial which prosecution called seven witnesses, he was convicted on the 2nd count and sentenced to serve twenty (20) years imprisonment.

After carrying out of voire dire examination M.Y told the trial court that on 13th October 2006 at about 4.00Pm she was at home with her grandmother D.K.Y when the appellant whom she knew as a Pastor came and requested her to accompany him to the laundry. She obliged and they got to the dhobi, one K.K who is a neighbour. Appellant removed some clothes from the bag and gave to the *dhobi* to have them ironed for him.

He instructed Pw 1 to pick the clothes later after they had been ironed and take them to the church, among them were three shirts. He gave Pw 1 the bag and she returned to her grandmother's. Appellant returned to say Pw 1 did not do as required that is to escort him to the stage and he told her grandmother that he wanted Pw 1 to escort him to the stage and although Pw 1 was then preparing tea, he insisted on her company saying that she would not be long.

So Pw 1 went with appellant up to the stage and into a storeyed house which he told her belonged to him – it was actually a lodging but Pw 1 did not know this. A lady opened room 9 for them and they got in and appellant closed the door. He then stood up from his chair and when Pw 1 made to scream, he closed her eyes and mouth, using his hands- so she could not scream. Appellant then lifted her skirt, removed her under pant, unzipped his trouser and put his penis onto her vagina – by now they were on the bed. After finishing, he told her to put on her pant – she was already bleeding. Appellant instructed her to get out and say it was a Somali who had defiled her.

On the way she saw one Alice Karume who assisted her to get into a tuk tuk. When Alice asked her what had happened, she said it was a Somali and even at the police station, she was not able to say. She lost consciousness and was admitted to Malindi District Hospital for a week. Later she disclosed to her grandmother and Alice, the truth about her assailant's identity.

It was Pw1`s evidence that she knew appellant as they were neighbours at LB. On cross-examination Pw 1 stated that she had escorted appellant on two other occasions. She described how the appellant held and undressed her and that after the sexual encounter there were blood stains on the bed sheet. The blood stained shirt, innerpant, lesso and Pw 1 were that day were identified by her in court and produced as exhibit.

Katana Kazungu (Pw 2) who runs a laundry at M confirmed having seen appellant at the laundry and that the appellant sent Pw 1 for a bag and when she brought it, he removed, four shirts which he instructed Pw 2 to iron, saying Pw 1 would bring him the money – this was on 13/10/06 at about 7.00am. After about 15 minutes, Pw 1 was brought in a Tuktuk having been defiled. He knew both Pw 1 and the appellant.

Margaret Wangari Muchemi(Pw 3) who works at Tarino Guest Lodging testified that on 13/10/06 at about 7.00am, appellant went to the Guest house and asked for a room – he paid Kshs.350/- . He refused to give his name. He was accompanied by a young girl, and when Pw 3 inquired about her, appellant said she was his child and that the mother was behind. So they went into the room he had hired.

At about 10.30am she checked and found the key and the padlock at the door and the bags were missing. It is her evidence that she had washed the bedsheets. She did not know appellant before and she identified the duplicate of the receipt she had issued as Ex 7. She stated on cross-examination that she let out room 9 to him, which he rejected, so she assigned him room No.12. It was her evidence that there were no blood stains on the bed.

Pw 4 Alice Kalume runs a hotel near Farmers Bar and Lodging, testified that on 13/10/06 at about 7.00am, she was at her place of work when she saw a group of people and she decided to go and find out what they were looking at. She found a young girl standing with blood dripping from her private part – on asking what had happened, the girl said she had been raped by someone not known to her, who was dressed like an Orma or Maasai. She was about to get unconscious and appeared dizzy as a result of over bleeding, so Pw 4 got a Tuk tuk and the girl directed her to the grandmother`s home. Pw 4 also covered her with her lesso which got soaked in blood – she identified it in court. On cross-examination she stated that Pw 1 was in pain and that when she first saw Pw 1, she did not appear confused. However on re-examination she changed this and said;-

> ***"She was in confused state when I first saw her. She was talking in a fearful state as of(sic) she had been threatened by the assailant"***

Pw 1`s uncleS.K.Y received information about the incident and went to see Pw 1 in hospital where she was admitted, on a subsequent visit, she disclosed to him that she was raped by the Pastor who had picked her at home. He confirmed on cross-examination that the initial information he had received was that Pw 1 had been raped by a person not known to her.
Pc Gladys Akinyi(Pw 6) who received the report stated that Pw 1 was taken to the police station in a serious condition bleeding from her private parts. After being discharged from hospital, Pw 1 informed police that she was defiled by Pastor Alex Menza of M Church Malindi. After investigations appellant was arrested. Both appellant and Pw 1 were subjected to a HIV test put no significant finding was made.

On cross-examination Pw 6 stated that by the time the report was being made, Pw 1 was unconscious and so the report was made on her behalf by her grandmother to the effect that she was defiled by an unknown person at Kichinjioni. The other version implicating the appellant was made later. She confirmed that Pw 3 in her statement did not mention a little girl. It is worth nothing that Pw 3 informed the court that initially she had refused to record a statement and was detained at the police station and upon release she agreed to record her statement.

Doctor Vitalis Bwire(Pw7) produced the P3 form on behalf of Doctor Tinje. The examination on 13/10/06 found that Pw 1`s clothes (that is skirt, two lessos and an inner pant) were soaked with blood and she had lost a lot of blood and gone into shock. The injuries were approximately one hour and she had tears – her private parts were soaked with blood and were reddish. There was a lot of blood coming from the vaginal canal in big clots. There were tears on all sides of the vaginal wall and her age was assessed at 13 years. The appellant was also examined but his clothes were not available for examination and no injuries were noted. He was not examined immediately after the

incident.

In his unsworn defence, the appellant confirmed being escorted to the stage by Pw 1 but said he then left for Mombasa. Three days later while in Mombasa, he learnt that he was required at Malindi police station and when he reported there, he was detained in the cells but maintained that he never defiled Pw 1.

The learned Trial Magistrate made a finding that it was settled that the appellant and Pw 1 were together on the material date and that it was proved beyond reasonable doubt that Pw 1 had been defiled. She considered the evidence which she noted was circumstantial and weighed it against the appellant's evidence, and found that the appellant's evidence was discounted by that of Pw 2 who saw him and Pw 1 together and also Pw 3 (the cleaner) who encountered appellant, had the girl and even booked them into a room at the guest house/lodging where she worked. Coupled with the fact that shortly thereafter Pw 1 was seen, bleeding profusely and the next day she said it was Pastor Menza who had defiled her. The Trial Magistrate stated in her judgment;-

> ***"I hardly find any reason why a thirteen year old girl would fabricate such a story more so, against her pastor. Furthermore, it is not everyday that an adult male books himself and a young girl into a room. Though it was suggested by the defence that there was nothing in the receipt P exhibit 7 to show that it is the accused who booked the room, Pw 3 recognized the accused at the police station. I believe she must have remembered him as I have stated, it is not ordinary to book a room under such circumstances without raising an eyebrow''***

The Trial Magistrate found Pw 3 to be a truthful witness who could remember that the appellant had declined to give his name. She also noted that Pw 1 knew appellant very well. The defence case was considered, Trial Magistrate found that appellant chose to leave out details of how he took his clothes to the laundry and wondered what business a thirteen year old girl would have escorting a grown man who is no relative to the stage on her own. She held that

> ***"The circumstantial evidence as it is leaves no other inference other than that of the accused person's guilt. The accused had opportunity, he was recognized by the witnesses, he had influence over the young girl and took advantage of her…………………..."***

The Trial Magistrate found appellant's defence to be baseless and dismissed it. The grounds of appeal raised are that;-

1. The Trial Magistrate erred in finding that the circumstantial evidence was incapable of any other inference other than the guilt of the appellant.

2. The Trial Magistrate failed to adequately evaluate the evidence of the complainant and the witnesses.

3. The trial court failed to make a finding on where the offence was committed.

4. That the identity of the appellant was not proved beyond reasonable doubt.

5. The court failed to find that the evidence was inconsistent.

6. That the complainant did not identify the exhibits produced by Pw 6.

7. The trial court failed to find that Pw 3 evidence was obtained through coercion.

The appellant filed written submission which he faulted the particulars of the charge simply it failed to use the words unlawfully. In supporting the conviction and sentence, Mr Ogoti submitted that there is no defect in the charge as the same is available under section 8 (3) of the Sexual Offence Act – the provision reads as follows.

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."***

My finding is that the charge as drawn and the particulars as stated are within the legal provisions and there is no place for application of the cited case of **Tekarili and Others V R Court of Appeal No.182 of 1952 EACA**. The charge is not defective.

Appellant also raised the issue of violation of his constitutional rights saying he was arrested on 19/10/06 and arraigned in court on 25/10/06 resulting in delay for four days and he sought to rely on the decided case of **Albanus Mwasia Mutua VR Criminal Appeal No.120 of 2004** which held unexplained violation of a constitutional right under section 72 (3) (b)of will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced to support the charge. Mr Ogoti`s response to this is that the same is an ambush which did not form one of the grounds of appeal and it is an extraneous issue only introduced in the submissions. I agree under section 350 (2) Criminal Procedure Code provides as follows;-

**(1)** An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.

***(2)*** ***A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate: and <u>the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal</u>:***

This sort of situation was also considered in the case of **Elias Njeru V R Cr App No.186 of 2006** where the court declined to consider the issue of violation of constitutional rights as the appellant only introduced it on the morning of the hearing of appeal. Court of Appeal declined to indulge such an ambush and I am so guided to decline.

Appellant faults the findings of the Trial Magistrate that the circumstantial evidence pointed to his guilt, arguing that if one considers evidence of all the prosecution, then it clearly shows that this case was fabricated against him. He states that whereas evidence of Pw 1 suggest that they went to the laundry together, the evidence of Pw 2 is that Pw 1 went and found appellant at the laundry and says it is difficult to distinguish truth from fiction. He also points to the time offence is alleged to have taken place, pointing out that whereas Pw 1 says it was at about 4.00Pm when appellant took her from her grandmother's house, then on cross-examination she said they went to the stage at 8.00am. This is in contrast to evidence of Pw 2 who claimed to have seen the pair in his laundry at 7.00am.

He argues that the circumstances were not conclusive and that the contradictions go to show that the whole matter was a set-up. It is his contention that it was unsafe for the Trial Magistrate to convict him as the circumstances were not conclusive and the assertions were not proved by any evidence in court. He also questions why Pw 1 was sworn instead of being affirmed after the voire dire examination and relies on the provisions of section 125 of the Evidence Act which provides that;-

> ***"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put there are from giving questions by tender years, extreme old age, disease (whether of body or mind) or any similar cause"***

The appellant also contests the issue of identification saying that the Trial Magistrate put more trust in the evidence of Pw 5 without considering that it was marred with a lot of inconsistencies and conspiracies especially with regard to how she was eventually put to record her statement as it is apparent that she did so after some "duress".

Pw 1 claims that the offence took place at K, she later claimed to have been defiled at T Guest House Lodging and that despite Pw 1 claims that she was bleeding, Pw 3 did not find any trace of blood in the bed and quoted her as saying

> ***"I did not see any bloodstains when I went back. Anyone saying there was blood would be lying to court"***

Appellant points out the initial claim by Pw 1 that she said she was defiled by a Somali man at K before changing her version to mention appellant as the culprit and that it was at the Guest House. It is his submissions that this contradiction ought to be resolved in his favour. He doubt that his identity was established, saying there is no way Pw 3 could have been receptionist and cashier and cleaning and that Pw 3 only

got to see him for the first time when he was already at the house.

Appellant points out that Pw 1`s grandmother was an important witness yet she was not called to testify as a witness and it is his argument that the only reason for not bringing her as a witness is because her evidence would bring out the inconsistencies and contradictions in the prosecution case.

Appellant also queries the manner in which the exhibits were brought to court saying Pw 1 was never recalled to identify them and that the blood found on them was not sent for analysis to confirm they belonged to that of Pw 1. As far as the evidence by prosecution against appellant submits that the same was shaky and was not proved the charge beyond reasonable doubt.

Mr Ogoti in response submits that there can be no fabrication in this matter because not only was the appellant known to the complainant, but he was also known to the complainant's grandmother from whom he sought permission to enable the complainant escort him. The offence took place in broad daylight and it is from that relationship that appellant took advantage of the complainant. He asks the court to note the appellant's conduct once they got to the guest house – taking care not to disclose his name and that Pw 3 confirmed he was accompanied by a young girl and the explanation he gave to Pw 3 about the little girl who was in his company saying she was his child and that her mother was behind.

He wonders why Pw 3 (who did not know the appellant before) would fabricate evidence against him and argues that applicant was placed at the scene right from the moment he took the little girl from her grandmother's home, to the laundry and finally, to the guest house. Mr Ogoti further points out that the evidence of Pw 2 corroborates that of Pw 1.

As to what appears like a contradiction regarding who defiled Pw 1, Mr Ogoti urges this court to consider what Pw 1 told the trial court that appellant had instructed her to say she had been defiled by someone who looked like an Orma and points out that this is a young girl who trusted her pastor and complainant simply repeated what appellant had told her, when she was initially asked about the incident. He also asks this court to consider that when Pw 4 encountered. Pw 1 she said the girl appeared confused and fearful and Pw 1 was lying to protect the appellant.

As for the contradictions, it is Mr Ogoti`s submissions that those are so minor that they did not affect the prosecution case and that the evidence which was placed before the court was sufficient.

The learned Trial Magistrate properly carried out voire dire examination of the young girl and even recorded the questions which the court had put to Pw 1 when carrying out that examinations – she was of the opinion that Pw 1 did not understand the meaning and nature of an oath and thus directed that the child be affirmed. This is what section 125 of the Evidence Act anticipates and there was no error in law or fact by the steps the Trial Magistrate took in so directing.

As to claims that this matter is based on fabrication, there was nothing in the evidence led by prosecution or by the appellant, to suggest that there existed bad blood between the parties, indeed the evidence demonstrates a cordial relationship based on good faith.

There was no mistake about the identity of the appellant as he confirms being accompanied by the complainant from her home. He was known to complainant – he was seen in the complainant company by Pw 2 and Pw 3. What is referred to as contradiction is clearly explained – not that it was contradiction, it was the reaction of a fearful girl who still felt obliged to obey her pastor and protect him by repeating the lie he had instructed her to say that someone else defiled her. I take note that the Trial Magistrate was fully aware for the fact that the mattress or whatever beddings were on the bed were not found to be blood stained and that indeed the soiled clothes were not taken for sampling, analysis and matching –that is why she said the case was based purely on circumstantial evidence.

The most critical evidence is that of Pw 3 who saw the appellant and the girl together – she claims to have been placed in cells initially because of her reluctance to testify – however the police officer denied that such a thing happened and indeed there was no record from the

police station presented to confirm that she had been locked up on account of refusing to record her statement. She saw appellant accompanied by the little girl whom he claimed was his child. He protected his identity by declining to disclose his name.

Initially she had assigned him room 9, (which corroborates what Pw 1 stated), but appellant rejected that one and was then given room 12. When she later checked, both appellant and the girl were gone. PW3 didn't know appellant before so there would be no reason for her to fabricate evidence against him.

The Trial Magistrate determined the case on the basis of circumstantial evidence presented. The case of **Kipkering Arap Koske and Kimure Arap Matata(1949) 16 EACA 135**, laid down the standard required to prove a case based on circumstantial evidence – the test being whether the evidence irresistibly points to the guilt of the accused and whether there are no existing factors on circumstances which are likely to create or destroy the inference of the accused person's guilt. This approach was further stated the case of **Charles Mathenge Murugi and Another V R Criminal Appeal No. 72 of 1997** as follows;-

> ***"…………..in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation or any other hypothesis except the hypothesis that the accused is guilty of the charge………………."***

The links in the chain in this matter are demonstrated by the evidence of prosecution, how appellant got complainant to accompany him (this is even confirmed by him), he was known to her pastor, so she trusted him indeed they passed at the laundry where he left his clothes saying Pw 1 would go to collect them later – whether he got in the laundry before her or they got there separately does not affect the material to the fact that they ended up at the laundry together and left together – to the guest house where appellant hired a room and shortly thereafter the pair had left the room and Pw 4 met complainant bleeding – the medical evidence confirms she had been defiled. That evidence displaces the appellant's defence that he parted company with the complainant at the stage and he proceeded to Mombasa – if he ever went to Mombasa, it was after the event. The soiled garments produced in court goes to strength the evidence of Pw 1 and it has not been demonstrated how produce to call Pw 1`s grandmother as a witness was adverse to prosecution case, after all appellant confirmed leaving in the company of the young girl.

The evidence placed appellant at the scene and he had opportunity to commit the offence. The Trial Magistrate properly considered the evidence and made at the appropriate finding, I find no reason to fault the judgment whatsoever. Consequently the conviction was safe and I uphold it. The sentence was legal and I confirm it. The appeal is thus dismissed.

Delivered and dated this **11th** day of **December 2009** at Malindi.

**H A OMONDI**
**JUDGE**