**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.274 OF 2016**

***(An Appeal arising out of the conviction and sentence of Hon. L.A. MUMASSABBA –RM delivered on 8th July 2015 in Mavoko SPMC. Cr. (S.O.) Case No.8 of 2015)***

**CATHERINE ADEMA MORIASI……..APPELLANT**

**VERSUS**

**REPUBLIC…….....RESPONDENT**

**JUDGMENT**

The Appellant, Catherine Adema Moriasi was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the offence were that on 31st March 2015 in Machakos County, the Appellant intentionally and unlawfully caused her female genital organ (vagina) to be penetrated by the male genital organ (penis) of BM (complainant), a child aged ten (10) years. She was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully caused her female genital organ (vagina) to come into contact with the male genital organ (penis) of the complainant. When the Appellant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, she was convicted of the main count of **defilement.** She was sentenced to life imprisonment. The Appellant was aggrieved by her conviction and sentence. She filed an appeal to this court.

In her petition of appeal, the Appellant raised several grounds of appeal challenging her conviction and sentence. She was aggrieved that she had been convicted on the basis of prosecution's evidence that did not establish her guilt to the required standard of proof. She took issue with the fact that she was convicted despite the fact that the prosecution had failed to establish the essential elements of the charge to the required standard. She faulted the trial magistrate for failing to take into consideration that vital witnesses were not called to corroborate or prove the charge thus rendering her conviction unsustainable. She was of the view that the evidence adduced by the prosecution witnesses was contradictory and raised reasonable doubt that she had indeed committed the offence. She faulted the trial magistrate for failing to properly evaluate the evidence on record and therefore reached the erroneous conclusion that she had committed the offence after shifting the burden of proof. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the custodial sentence that was imposed on her.

During the hearing of the appeal, the Appellant presented to court written submission in support of her appeal. She urged the court to consider her submission and the medical report that she had presented to court. She told the court that she was a mother of four (4) children who were currently being taken care of by her ailing mother. She urged the court to allow the appeal. Ms. Aluda for the State opposed the appeal. She submitted that the prosecution had established the charge of defilement to the required standard of proof. The prosecution established that the Appellant slept with the complainant for a whole night and in the course of sleeping with him sexually assaulted him. She acknowledged that though the evidence adduced by the complainant was that of a single witness, he was telling the truth and therefore his evidence is admissible in accordance with **Section 124** of the **Evidence Act**. She urged the court to disallow the appeal.

Before giving reasons for its decision, it is imperative that the court sets out the facts of this case, albeit briefly. The complainant in this case lived with her mother in Mulolongo. He was at the material time aged ten (10) years. His father at the time worked in China. His mother PW3 RMS told the court that she left the complainant under the custody of the Appellant and her sister PW2 ENM when she went to visit her husband in China on 15th March 2015. PW2 lived at her residence in a different house within Athi River Township. She promised PW3 that she would keep an eye on the complainant while she was away. She undertook to visit the complainant in their home several days in a week. The Appellant, who was employed as a househelp, was the only one who lived with the complainant, during the absence of PW3, at their home at Utawala Estate.

The complainant testified that on 31st March 2015, the Appellant enticed him into her bed and had sex with him. This is what the complainant said in his evidence:

> "***I share a room with the accused. There are two beds. Mine and hers. Accused called me to her bed and removed all her clothes then we had sex. I removed my T-shirt and trouser. I am the one who removed the clothes. Accused told me to touch her buttocks. I touched her buttocks. We were on aunties' bed (accused). I inserted my finger in her buttocks as she had told me. All the fingers. I slept with her till morning. Accused touched my back with her hand. My auntie called "M" came the next day and she took me to hospital at Nairobi Women's Hospital. "Alishika kitu yangu ya kukojoa akaingiza kwa yake". Accused was sleeping on top of me. I felt pain…Aunty alinifanyia tabia mbaya".***

PW2 testified that on 2nd April 2015, she went to visit the complainant at their home. She found the Appellant airing the mattress which the complainant had slept on. The Appellant was chastising the complainant for having wetted the bed. The Appellant told PW2 that the complainant had wetted his bed. She appeared unhappy with the event. PW2 spoke to the complainant. The complainant told her that the Appellant had sexually assaulted her. This is what PW2 stated:

> "***He told me it was a secret between them but after I sweet talked him, he told me accused removed her clothes, he also removed his clothes, accused told him to touch her buttocks, held him tightly on her body and told her to insert his fingers in her buttocks and vagina."***

After being told the above by the complainant, PW2 took the complainant to the Nairobi Women's Hospital branch at Kitengela. He was examined by Dr. Mueni.

The medical report (P3), the Post Rape Care (PRC) form and the age assessment report were produced on her behalf by PW7 Christine Kiteshuo, a Clinical Officer based at the same hospital. PW7 noted that the complainant was taken to the hospital on 8th April 2015. His examination revealed the following:

> ***"He was in a stable condition, was calm. He did not have any injuries or infection. He was given a pain killer injection. His private parts and anus were examined. They were intact. The penis was also intact. It is not possible to tell if a boy has been defiled when examining a penis. It is only in the anus where you can tell if there are bruises…No bruises were seen. Anal region was intact."***

The case was investigated by PW6 PC(W) Veronica Ntabo. She formed the opinion that a case had been made for the Appellant to be charged with the offence for which she was convicted.

When the Appellant was put on her defence, she denied committing the offence. While admitting that she had slept with the complainant on her bed on the material day, she explained that the reason for this decision was because the complainant had wetted his bed. He could not therefore sleep on his bed. She told the court that she did this because of her motherly instinct but not for any ulterior reason. She was shocked when she was arrested and charged with an offence that she had not committed.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made by the parties to this appeal. For the prosecution to establish the charge of **defilement,** it was required to establish the three essential ingredients of the charge, that is, penetration, the age of the complainant and the identity of the perpetrator. In the present appeal, it was the prosecution's case that the Appellant had defiled the complainant by coercing him to have sex with her. It was clear from the prosecution's evidence that the prosecution relied on the sole evidence of the complainant to establish the fact of penetration. The medical evidence that was adduced did not support the Appellant's contention that he had been sexually assaulted. The Appellant denied that she sexually assaulted the complainant.

From this court's re-evaluation of the evidence, it was evident that there was no dispute that the Appellant slept with the complainant on the same bed on the material night. The reason for this is where there is variance between the Appellant's narrative and the complainant's testimony. Whereas the complainant testified that he was enticed into the Appellant's bed by the Appellant, the Appellant explained that she took this action because the complainant had wetted his bed. He could not therefore sleep on his bed. The Appellant's testimony in that regard was corroborated by PW2, the complainant's aunt who testified that she found the Appellant airing a mattress while she was complaining that the complainant had formed a habit of wetting his bed.

The complainant's narrative as to what transpired on the material night is inconsistent. It is not clear from his evidence if the complainant actually was forced to insert his penis into the Appellant's vagina. According to the complainant's narrative, the Appellant asked him to touch her buttocks and then insert his fingers into her buttocks and vagina. Later he says that he was sexually molested. The complainant's testimony should be considered in the context in which he first alleged that he had been sexually assaulted. He made this allegation after the Appellant had rebuked him for wetting his bed. The Appellant chastised the complainant in the presence of PW2. PW2 appeared not to have

been impressed by the fact that the Appellant was reprimanding the complainant. It was from that point that she, to use her words, ***"sweet talked"*** the complainant into revealing that he had been sexually assaulted.

The **Proviso** to **Section 124** of the **Evidence Act** allows this court to convict the Appellant on a sexual offence on the sole evidence of a child. However, this court must be convinced that the child is telling the truth. In the present appeal, it was clear to this court, from the inconsistent nature of the evidence adduced by the complainant that he was not telling the truth or at the very least was embellishing his story. The complainant's circumstances is similar to the one that was observed by the court in **FAPPYTON MUTUKU NGUI –VS- REPUBLIC – CRIMINAL APPEAL NO.296 OF 2010** where the court held thus:

> ***"Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:***
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> ***First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children."***

In the present appeal, it was apparent to this court that the only misdemeanour that the Appellant may have committed was to sleep with the complainant on the same bed. The description given by the complainant as to the touching of the Appellant's buttocks may have been accidental or the active imagination of the complainant. This court was convinced by the explanation given by the Appellant to the effect that she slept with the complainant because the complainant had wetted his bed and could not sleep on his bed on the particular night because the mattress was still wet. The decision may have been ill advised but this court formed the view that it was made in good faith. The Appellant had no intention to sexually molest the complainant. In any event, it was clear from the evidence adduced by the prosecution witnesses that the prosecution had failed to establish its case on the charge of **defilement** to the required standard of proof beyond any reasonable doubt.

In the premises therefore, the Appellant's appeal has merit. It is hereby allowed. The Appellant's conviction is quashed. She is acquitted of the charge. She is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2018**

**L. KIMARU**

**JUDGE**