



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEALS NO. 48 & 49 OF 2017 (Consolidated)**

**DANIEL MANGENGA MOSETI.....1<sup>ST</sup> APPELLANT**

**FRED MOSETI CHARLES.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Being an appeal from the Conviction and Sentence of Hon. N. Kahara – SRM dated 4<sup>th</sup> September 2017 in Keroka Criminal Case No. 1244 of 2015]**

**JUDGEMENT**

The appellants were charged with separate counts of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act and also on separate counts of committing indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

They pleaded not guilty and a trial ensued. The prosecution called four witnesses – the victim (Pw1), her mother (Pw2), a clinical officer (Pw3) and a police officer (Pw4). The 1<sup>st</sup> appellant made an unsworn statement while the 2<sup>nd</sup> appellant gave sworn evidence. After evaluating the evidence, the trial magistrate found the appellants guilty, on the principal charge, convicted them and sentenced each of them to a term of imprisonment for twenty (20) years.

Being aggrieved the appellants preferred separate appeals. Mr. Abobo, their Advocate, applied and was granted an order for consolidation of the two appeals and the consolidated appeal then proceeded by way of written submissions. The appeal is premised on grounds: -

**“1. THAT the learned trial magistrate erred in law and in fact in convicting the Appellant when the complainant had made an admission that the Appellant was his boyfriend.**

**2. THAT the learned trial Magistrate erred in law and in fact in convicting the appellant when the clinical tests done on the Appellant was done more than 48 hours after the alleged offence.**

**3. THAT the learned trial magistrate erred in law and in fact in convicting the Appellant without being satisfied of the evidence of the Complainants Pw1 who was only escaping from her guilt and offered as a scapegoat the Appellant to cover her absence from home.**

**4. THAT the learned trial magistrate erred in law and in fact in convicting the Appellant to 20 years imprisonment which was excessive on the circumstances as the Complainant was aged 14 years old.**

**5. THAT the Appellants rights were violated as he was not supplied with witness statements thus he was not accorded a fair hearing.**

**6. THAT the learned trial magistrate erred in law and in fact in convicting the Appellant when the only witness who did not corroborate her evidence is her mother who would naturally support her daughter.”**

In his submissions, Mr. Abobo submitted that the complainant was in the habit of “*mutually*” having sex with the appellants and that it is baffling that whereas the offence took place on 7<sup>th</sup> September, 2015 she was examined on 29<sup>th</sup> February 2016 a duration of over 6 months. He contended that even with common sense and logic the medical evidence could not be relied upon. Counsel submitted that the report could have been concocted by the clinical officer. Counsel pointed out that the complainant in the report is named as J S G yet the complainant in the charge sheet is S G. Counsel submitted that the contradiction in the names casts doubt as to whether the complainant’s medical report was produced. Counsel further submitted that these days girls mature fast and if the complainant who was 14 years old could

have sex with two boys then she was mature and could not **“complain enjoying sex.”** He contended that her staying away from home was a concealment of her guilt and the appellants are but scapegoats. Counsel pointed out that whereas the complainant’s mother testified that she was treated at Borabu Hospital, the trial magistrate contradicted herself by stating that the treatment chits were from Keroka District Hospital. Counsel also termed it unbelievable that the appellants were arrested one year after the commission of the offence. Counsel also pointed out what he referred to as a contradiction between the police officer’s evidence and that of the clinical officer concerning the facility he worked and the date of the examination. He concluded by submitting that the trial magistrate convicted the appellants against the weight of the evidence.

The appeals are opposed. Counsel for the State submitted that at 14 years the complainant was in law incapable of consenting to sex with any man. Counsel submitted that the complainant’s age was not in dispute at the trial and that her admission that the appellants were her boyfriends has no effect. Counsel contended that the complainant gave a vivid account of how the two appellants had sexual intercourse with her. He submitted that her evidence was corroborated by her mother as well as the medical officer. Counsel submitted that her evidence was clear and honest and that it remained unshaken during cross examination.

On the sentence, Counsel submitted that the same was lawful. The issue of fair trial, Counsel submitted that the appellants participated fully in the trial and at no time did they object on the ground that they were not served with the statements of the witnesses. He also contended that it is common that issues of this nature are shared between mothers and daughters and therefore there was no illegality in Pw1’s corroboration coming from her mother.

I have considered the rival submissions but as the first appellate court, I have evaluated the evidence in the lower court so as to arrive at my own conclusion. I have made provision for not having heard or seen the witnesses. The complainant in this case told the court that her name is D S. Her mother did however clarify that she was also called J S and indeed her birth certificate (Exhibit 1) reads J S. Her identity was not an issue at the trial. Counsel for the appellants submitted there was a contradiction in the name given in the charge sheet and in the P3 Form. I have looked at both and they all refer to J S G. It is clear therefore that the P3 Form referred to the complainant.

It is my finding that the P3 Form corroborates the evidence of the complainant. Apart from the P3 Form the prosecution produced a hospital card No. [Particulars withheld] (Exhibit 2) which indicates that the complainant was seen at Borabu District Hospital Level “4” on 10<sup>th</sup> September 2015. This was barely three days after the offence was committed. The P3 Form filled on 29<sup>th</sup> February 2016 only goes to fortify the findings in the said card. Moreover, it is clear from the evidence of the complainant’s mother (Pw2) that she was a truthful witness. She readily told her mother where she had spent the night and what she had done with the appellants. To me the complainant paints the picture of a forthright witness. She vividly narrated how and why she went to the house of the appellants and how they had sexual intercourse with her at different times. Her age was proved by production of a birth certificate and she is a child within the meaning of the Children’s Act and the Sexual Offences Act and hence incapable of giving consent to sexual intercourse. I do therefore agree with prosecution Counsel’s submission that her reference to the appellants as her boyfriends is of no effect. It is also immaterial that she had allowed them to abuse her previously. Her evidence was corroborated in all aspects by the other witnesses and it is my finding that the defence could not withstand such cogent evidence.

The record shows that on 16<sup>th</sup> December 2015 the court directed the prosecution to supply the appellants with statements at their own costs. The proceedings recorded on 29<sup>th</sup> February 2016 have both appellants stating: -

***“I am ready. I have statements.”***

This was before the trial commenced and the allegation that their right to a fair trial was violated as they were not supplied with statements is not therefore true. The ingredients of the charge were proved against the appellants beyond reasonable doubt. The sentence imposed is the minimum provided under the law. In the premises the appeal has no merit. The same is dismissed and the convictions and sentences are upheld.

It is so ordered.

**Signed, dated and delivered in open court this 8<sup>th</sup> day of November 2018.**

**E. N. MAINA**

**JUDGE**