



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 8 OF 2013**

**(Appeal against Conviction and Sentence in Murang'a CM Criminal Case No 3398 of 2009 – E.N.J. Osoro, SPM)**

**ROBERT MUCHOKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant herein, **Robert Muchoki**, was convicted after trial of **defilement** contrary to **section 8(1) & (2)** of the **Sexual Offences Act, No 3 of 2006**. It was alleged in the particulars of the offence that on 17<sup>th</sup> September 2009 at [Particulars withheld] Village in Murang'a District within Central Province, he intentionally and unlawfully caused his penis to penetrate the vagina of one **LW**, a child aged 10 years. He was sentenced to life imprisonment. He has appealed against both conviction and sentence. Learned Prosecution Counsel does not support the conviction.

2. I have read through the record of the trial court in order to evaluate myself the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I must however remember that I neither saw nor heard the witnesses myself and give due allowance for that fact.

3. I note that the convicting learned magistrate took over the trial from another magistrate who had been appointed Judge. The first trial magistrate had taken fully the prosecution case and had put the Appellant to his defence. The second trial magistrate took only the Appellant's defence (in the form of his unsworn statement) and prepared and delivered the judgement.

4. The Appellant was essentially convicted upon the testimony of the complainant, a child aged about 10 years, who gave unsworn testimony. This is because the medical evidence which would otherwise have corroborated the testimony of the complainant was suspect as the medical report appeared to refer to a different patient, a woman aged 50 years. The clinical officer who had initially examined the complainant and apparently mixed up her medical report with that of another patient did not testify. Another clinical officer (PW7) apparently examined the complainant a second time some eight (8) days after the alleged defilement, and purported to give the findings in the impugned medical report. But the issue of this botched-up medical report was never satisfactorily resolved.

5. The testimony that could have corroborated the testimony of the complainant was given by her younger sister (PW3) who was 8 years old and gave unsworn testimony. This evidence that itself required corroboration could not corroborate other evidence.

6. In those circumstances, the trial court (which had not heard or seen the prosecution witnesses testify) should have cautioned itself in accordance with the **proviso** to **section 124** of the **Evidence Act, Cap 80**. There was no such caution.

7. Finally, the age of the complainant was not established by any credible evidence beyond her say-so that she was 10 years old. Even her mother (PW2) never referred to her age. The punishments for the offences under section 8 of the Sexual Offences Act are age-dependent, and therefore the age of the

victim is an essential ingredient of those offences which must be proved beyond reasonable doubt. There was no such proof.

**8.** Learned Prosecution Counsel therefore properly conceded this appeal.

**9.** I will allow the appeal in its entirety. The Appellant's conviction is hereby quashed and the sentence passed against him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 8<sup>TH</sup> DAY OF MARCH 2016**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 11<sup>TH</sup> DAY OF MARCH 2016**