**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 25 OF 2013**

**J K H……..……APPELLANT**

**VERSUS**

**REPUBLIC……..…….RESPONDENT**

***(Being an appeal against conviction and sentence in Mukurweini Principal Magistrate's Court Criminal Case No. 382 of 2011 (Hon. Wendy Kagendo) delivered on 18th August, 2012)***

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to **section 8(1)** and **(3)** of the **Sexual Offences Act, No. 3 of 2006**. According to the particulars of the offence, on the 11th day of June, 2011 at [particulars withheld] within Nyeri County, the appellant intentionally caused his penis to penetrate the anus of S N W, a child aged 13 years. The appellant also faced the alternative count of committing an indecent act with a child contrary to **section 11(1)** of the same Act; in this particular instance, he was alleged to have intentionally touched the anus of S N W a child aged 13 years with his penis on the 11th day of June, 2011 at [particulars withheld] within Nyeri County.

The trial court found the appellant guilty of the main count and sentenced him to 30 years imprisonment. In coming to this decision, the learned magistrate held that according to the medical evidence there was tenderness on the complainant's anal region; this evidence coupled with the complainant's evidence that the appellant had sodomised him, was a sufficient proof of the principal count and to that extent, the prosecution had proved its case beyond all reasonable doubt.

The learned magistrate also held the appellant not to have been remorseful and that he was not a first offender and thus she sentenced him as she did.

The appellant was not satisfied both with the conviction and the sentence and hence this appeal; he raised the following grounds in his amended petition which he filed in court on 29th March, 2016:-

1. The trial court erred in law and in acting on the complainant's evidence given in contravention of, apparently, the Oaths and Statutory Declarations Act with respect of the evidence of children;

2. The trial magistrate erred in law and in fact by holding that the complainant was aged 13 when there was no documentary proof to establish that fact;

3. The trial magistrate erred in law and in fact in convicting the appellant on the evidence that was not proved;

4. The learned magistrate erred in law in rejecting the sworn testimony of the defence which was neither displaced nor contradicted by the prosecution.

At the hearing of the appeal, the appellant informed the court that he had filed submissions upon which he relied entirely; in summary he complained that the despite the fact that the complainant was a child of tender years, he was not subjected to voire dire examination before his evidence was taken; in any event, so he submitted, the age of the complainant was at best, speculative, since there was no proof of his age. The appellant also submitted that the evidence did not support the charges against him and in particular cited the medical evidence according to which the clinical officer testified that the tenderness of the complainant's anal region could have been caused by anything else. Finally, the appellant submitted that his defence was not given any consideration and was casually dismissed contrary to the provisions of **section 169(1)** of the **Criminal Procedure Code, Cap.75**.

The state opposed the appeal; its learned counsel submitted that voire dire examination of the complainant was unnecessary as the complainant was not a child of tender years as defined in the Children Act, Cap. 141 and in this regard counsel relied on the Court of Appeal decision in **Malindi Criminal Appeal No. 44 of 2013, MK versus Republic (2015)eKLR** in which the Court adopted the definition given in the Children Act as the proper definition of a child of tender years for purposes of taking of evidence of such children.

Counsel for the state conceded that the age of the complainant was not proved but submitted that in view of the fact that the offence of defilement had been proved to have been committed, this Honourable Court could invoke the provisions of **section 358** of the Criminal Procedure Code and remit the case back to the magistrates' court for purposes of taking evidence on this particular aspect of the prosecution case.

The state counsel also submitted that the appellant sodomised the complainant and there was penetration as understood under section 2 of the Sexual Offences Act; here counsel relied on the medical evidence which established that there was tenderness at the complainant's anal region.

As far as the appellant's defence is concerned, counsel submitted that it was duly considered but duly dismissed. He urged that the trial against the appellant was fair and thus the conviction should be sustained and the appeal dismissed.

To appreciate fully the respective parties' submissions and inorder to consider whether the learned magistrate herself appreciated the evidence and came to the correct decision, it is necessary to relook at the evidence at the trial an analyse it afresh; this exercise may lead this court to its own factual conclusions independent of what the learned magistrate came to but it is cautious that it is only the latter who is presumed to have heard and saw the witnesses. **(See Okeno versus Republic (1972) EA 32).**

The presumption that the trial court heard and saw the witnesses in the case against the appellant is rather rebuttable because the learned magistrate who convicted the appellant did not hear or see any of the prosecution witnesses; she was seized of the proceedings after the prosecution evidence had been taken and proceeded from where her predecessor had left. It follows that she might not have been in a better position than this Court as far assessment of the prosecution evidence is concerned.

Be that as it may, this Court being the first appellate Court always has the duty of considering the evidence at the trial afresh and come to its own conclusions irrespective of whether the magistrate who concluded the trial against the appellant heard the entire evidence or whether he heard and saw all the witnesses.

The complainant, **PW1** testified that he was aged thirteen and that on 11th June, 2011, he was at his grandmother's home together with her children. Shortly thereafter he overheard the appellant herein, whom he referred to as his grandfather, say that M's (PW2's) children should leave his home and return to their father. He (the appellant) then armed himself with a panga and chased **M (PW2)** and her children away; also chased away were the complainant and his brother. It was the complainant's testimony that everybody else returned home except **M M (PW2)** and once there, the appellant told the children not to

sleep until M returned home. The appellant is then alleged to have led the complainant to his single room where he allegedly knocked the lamb down and grabbed the complainant as he attempted to flee. Somehow, the complainant realised that the appellant had removed his cloths and that he held the complainant firmly restraining him from fleeing. According to the complainant, he only escaped when the appellant decided to go and get petroleum jelly. He fled to where his grandmother was and narrated to her his ordeal; his grandmother helped him call one W that night. He also spent the night with her and reported the incident to the village elders and the assistant chief the following day. It is on the same day that the complainant and his grandmother made a report to the police who are said to have referred the complainant to hospital.

**M M M (PW2)** testified that the appellant was her brother and that on 11th June, 2011, at around 8.00 pm the appellant came and asked why she was living at that particular home. Her response was that that was their home. The appellant then armed himself with a panga, apparently to attack her but she escaped to her neighbour's home where she spent the night; she named the neighbour as F W. She was summoned at the assistant chief's office where she found the complainant who stated that he had been sodomised by his grandfather. A police officer, according to the witness, summoned the complainant's grandmother whom she named as **L W (PW3);** she indeed joined them and took the complainant to hospital. At her cross-examination the witness stated that the appellant only chased her away and not the children.

**L W N (PW3)** testified that on 12th June, 2011 at about 7.30 pm **M (PW2)** telephoned her while she was at [particulars withheld]. She went to the Assistant's Chief Office where she found M and the complainant. The complainant told her that the appellant, who is her brother-in-law, had sodomised him. They all proceeded to Mukurweini hospital where the complainant was examined.

The clinical officer who examined the complainant was **Mr David Kabuga (PW4)**; he testified that he attended to the complainant on 9th June, 2011. Upon examination, he found the complainant to be in a fair general condition except that he was in intense pain and that there was tenderness around his anal area. He assessed the degree of the injury as 'harm'. The officer admitted that the examination could not reveal whether the complainant had been sodomised and that the tenderness was superficial; in his opinion the tenderness could be caused by anything and not necessarily by a genital organ.

The Assistant Chief of Ichamara sublocation, **Mr Mwangi Warui, (PW5)** testified that on 12th June, 2011 at around 7.00 am he got a call from one Mureithi Thiongo, whom he described as a village elder informing him that the complainant had been sodomised by the appellant. He then called the complainant's grandmother with whom they agreed to meet at his office. Upon enquiry, the complainant told him that on the previous night, the appellant had come to his grandmother's home and after causing disturbance he led the complainant to his house where he sodomised him. The Assistant Chief advised the complainant and the grandmother to take up the matter with the police. In cross-examination, the Assistant Chief testified that he has handled land disputes involving the appellant's family members.

The last prosecution witness was **Police Constable Morris Odhiambo (PW6),** who confirmed that the complainant and his grandmother made a report of sodomy at Mukurweini police station on 12th June, 2011. The officer referred them to Mukurweini police station where the complainant is said to have been treated and discharged. Later, he arrested the appellant in Nyeri and charged him. At his cross-examination, the officer admitted that he did not take any statement from the appellant and that he charged him only because the doctor's report implicated him.

On his part the appellant gave a sworn testimony in his defence; he testified that on 9th June, 2011, he differed with his sister-in-law, that is, the wife to his brother, her child and the grand child and that he reported the dispute to the **Assistant Chief (PW5)** who testified of the land disputes in the appellant's family. It was the evidence of the appellant that on 10th June, 2011, his sister who shares a home with him and her six children together with his brother's family argued over land. On 13th July, 2011, he was arrested in Nyeri where he alleged he had gone to look for a job and that he was held in custody until the 13th July, 2011 when he was charged in court.

At his cross-examination, the appellant explained that his brothers were J M and one A who, apparently, was deceased. **M (PW2)** was apparently his sister while **L W (PW3)** was A's wife (the appellant's sister-in-law). W M was the appellant's brother's daughter (his niece) while the mother to the complainant was the daughter to his brother A M (deceased) and it is for that reason that the complainant was referring to him as her 'grandfather'. According to the appellant, he shared the same compound with the complainant's family. The land which they occupy has been subdivided and the appellant's share is one acre; however, despite the sharing out of the land, there have always been land disputes between him and the rest of his family members.

This is the evidence that the trial court was confronted with and it is now necessary to evaluate it in the context of the law under which the appellant was charged and subsequently convicted.

**Section 8 (1)** and **(3)** of the **Sexual Offences Act** provides as follows:-

8. **Defilement**

1. *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

2. …

3. *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.*

According to this section two critical elements must be established before one is convicted of the offence of defilement; first, the act of penetration and second, the age of the victim.

"Penetration" as a technical term is defined under **Section 2** of the Act to mean *"the partial or complete insertion of the genital organs of a person into the genital organs of another person"*.

The medical evidence **Mr David Kabuga (PW4),** the clinical officer who examined the complainant**,** was to the effect that the complainant suffered tenderness on the anal region and the probable type of weapon causing the injury was 'blunt'. He admitted, however, that "the tenderness could be caused by anything else", thereby implying that it was not necessarily caused by the appellant's genital organ as suggested by the charges against him.

In view of the inconclusiveness of the medical evidence as to what could probably have injured the complainant, the natural evidence to fall back to remove the apparent doubt would have been the evidence of the complainant himself; however, looked at in its entirety, that evidence is not helpful either. At no time did the complainant ever mention in his evidence that the appellant caused his penis to penetrate his anus or even attempted to. All he said, as far as the material particulars of his evidence were concerned, was that the appellant "grabbed me by the shoulder as I attempted to flee…and held me firmly". No evidence was given as to the position of the appellant vis-à-vis that of the complainant and whether he inserted or attempted to insert his genital organ into the complainant's anus. It can never be assumed that by grabbing the complainant by the shoulder when he attempted to flee and holding him firmly, the appellant thereby committed an act which causes penetration with a child as understood under **section 8 (1)** of the Act; simply put the charges as framed were not supported by the evidence and in the absence of this crucial evidence it cannot be said that the offence against the appellant was proved beyond reasonable doubt. In my humble view, the learned magistrate misdirected herself on the evidence and came to an erroneous conclusion in this regard.

The other aspect of the evidence that the learned magistrate seems to have overlooked is the evidence on the age of the complainant.

Under **section 8(1)** of the Act, defilement is not an offence as defined in that particular section unless the act of penetration is with a *child.*

As to who qualifies to be a child for purposes of the Act is not a question left to speculation; he is defined under **section 2** of the **Children Act, Cap 141** as "*any human being under the age of eighteen years"*. It follows that the age of a victim of a sexual assault is an important and a necessary component of the offence of defilement and to sustain a conviction for this offence, it must be proved, as a matter of law, beyond all reasonable doubt.

Proof of age is not just important merely to prove whether there has been defilement or not; it is equally important in the meting out the punishment against an offender who has been convicted of this offence either under **subsections (2), (3) or (4)** of **section 8** of the **Act.** The severity of the punishment under this subsection is directly proportional to the age of the victim; under **subsection (2)** an offender convicted of defiling a child of 11 years or less faces a mandatory sentence of life imprisonment; according **to subsection (3)** under which the appellant was charged and subsequently convicted, the offender faces a minimum sentence of 20 years imprisonment while under **subsection (4)** where the victim is aged between 16 and 18, the offender is liable to imprisonment for a term not less than 15 years.

**Subsection 3** was of particular interest in the sentencing of the appellant and thus it is apt to reproduce it here:

> ***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. (Underlining mine).***

It is apparent, therefore, an offence of defilement under **section 8(3)** can only be said to have been proved only if the age of the victim of the sexual assault has been established beyond all reasonable doubt; similarly, the court can only properly mete out the sentence against the offender if the age of the victim has been ascertained beyond peradventure. Suffice it to say that where an offence of defilement is alleged to have been committed, the age of a victim of a sexual assault is an essential ingredient in not only establishing that the offence itself but it is equally necessary in the sentencing of the convicted offender.

Coming back to evidence on record, there is nothing in it to suggest that the age of the complainant was established to the required standard; only the complainant himself stated that he was thirteen. The only other person who mentioned the complainant's age was the clinical officer but he was simply referring to what was indicated by the police in the P3 form which they gave to the complainant; he never assessed the complainant's age himself.

According to **section 8** of the **Act**, age must be proved beyond all reasonable doubt as it is an essential ingredient of an offence of defilement. In the two Court of Appeal decisions that I have come across, and where this issue has arisen, the Court of Appeal has been of the view that proof of the fact of age demands some sort of documentary evidence. The Court, sitting at Kisumu in **Criminal Appeal No. 164 of 2009**, **Dennis Abuya versus Republic** held that an **"estimated age"** indicated by a clinical officer in a P3 form cannot be held to be sufficient proof of one's age. The learned judges (R.S.C. Omolo, J.W. Onyango Otieno, J.G. Nyamu JJA, as they then were) said:

> ***There is a P3 form in the record before us and it shows that on 26th June, 2007, the appellant's "Estimated age" was eighteen years. By "estimated age" we understand the clinical officer who examined the appellant at Kima Mission Hospital, was saying the appellant could be eighteen years and above or below eighteen years. There was, however, no medical report or evidence produced by the prosecution to conclusively show that the appellant was eighteen years as at that date he was said to have committed the offence.***

In that appeal, the appellant had been convicted of the offence of defilement contrary to **section 8(1)** and **(2)** of the **Sexual Offences Act** and the issue that arose in the appeal was whether having been so convicted the appellant ought to have been committed to a borstal institution rather than imprisoned for life. For reasons given in the Court's judgment, an excerpt of which has been reproduced above, the learned judges allowed the appeal and remitted the case to the High Court with the direction that the Court calls for evidence establishing the appellant's age.

The point here is that the age indicated in a P3 form as "the estimated" age of either the victim or the culprit of a sexual offence is not a conclusive proof of that particular person's age; there is need for evidence ascertaining *conclusively* a person's age whenever the question of his or her age arises. In the case against the appellant, not even the "estimated age" was indicated in the P3 form.

The importance of ascertainment of age in sexual offences was also alluded to by the **same Court in Criminal Appeal No. 504 of 2010, Kaingu Elias Kasomo versus Republic.** At page 7 and 8 of its decision, the Court of Appeal had this to say:-

> **Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.**

The Court quoted with approval its own decision in **Alfayo Gombe Okello versus Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault the following terms:-

> **In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)… In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother M A when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find.**

The court concluded that ***"prove of age of a victim is a crucial factor in cases of defilement under the Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars***".

Considering the express provisions of the law supported by the forgoing decisions of the Court of Appeal, I am of the humble view that the prosecution took a rather lackadaisical approach to the issue of age in the trial against the appellant. On its part, the trial court misdirected itself both in fact and in law when it proceeded to convict the appellant without according this aspect of the offence the attention it deserved. Without the establishment of the age of the complainant, a conviction cannot be sustained under **section 8** of the Act and to this extent, the conviction of the appellant was, in my view, unsafe.

Whenever it has been proved beyond any shadow of doubt that an appellant sexually assaulted a person and, considering the peculiar circumstances of each particular case, I have always invoked section **358** of the **Criminal Procedure Code** and remitted the case back to the trial court to take the evidence on the age of the complainant if the only outstanding issue is that of the age of the complainant; indeed this is what the counsel for the state when he conceded that the age of the complainant had not been proved. I would have been persuaded to take a similar course but it is apparent that the question of age is certainly not the only unresolved issue at the appellant's trial. For reasons I have given, there was no sufficient evidence that the appellant was the perpetrator of the offence for which he was charged and convicted.

Taking about the insufficiency of evidence, I have to mention something about its credibility or lack thereof. If I got correctly the appellant's testimony with regard to his immediate family web, his deceased brother A M was the father of W M; W M was in turn the mother to the complainant.

**L W (PW3)** was the wife of A M and therefore she was the mother to W M; accordingly she was the complainant's grandmother.

**M M M (PW2)** was the appellant's sister and logically she was also the sister to A M whose daughter, as noted, was the complainant's mother.

It is important to understand these relationships because while the complainant testified that he was at his grandmother's home when the appellant attacked and chased away the grandmother, her children, together with the complainant and his brother, it was **M M M (PW2)** who testified that the appellant chased her away. The real grandmother **L W N (PW3)** was apparently not at the scene because according to her testimony it is only on the 12th June, 2011 when **M (PW2)** telephoned her about what had happened on the previous night.

Perhaps the complainant may be assumed to have been referring to **M M M (PW2)** as his grandmother too since she was a sister to her mother's father but then this presumption creates another problem in the complainant's testimony; he testified that when he escaped from the appellant's grip and fled, he went to where his 'grandmother' was. It is not clear which of the two grandmothers he could have escaped to because according to **M M M (PW2)** she only found the complainant at the assistant chief's office where she was summoned apparently on the following day. **L W N (PW3)** on the other hand, could not have known of the complainant's ordeal until she was allegedly called and informed by **M M M (PW2).** Just like **M (PW2)** she only found the complainant at the assistant chief's office.

It is must be remembered that according to the complainant's testimony, the complainant not only escaped to where his grandmother was but he also narrated to her what had happened to him on the material night. None of the 'grandmothers' corroborated this testimony; they both testified that they met the complainant at the assistant chief's office.

The neighbour, identified as F W in whose house **M M M (PW2)** is said to have found refuge that particular night did not testify and therefore M's evidence in this regard was uncorroborated. Although she also testified that she was the only one who was chased away, the complainant contradicted her testimony that everybody, including the complainant and the rest of the children were chased away by the appellant and that they only came back afterwards.

The contradictions and inconsistencies in the prosecution evidence in its material particular cast a shadow of doubt on whether the prosecution had proved its case against the appellant and in my humble view the appellant ought to have been given the benefit of this doubt.

In the ultimate I am persuaded that the appellant's appeal is merited and I am inclined to allow it; I hereby quash the conviction and set aside the sentence. The appellant is set at liberty unless he is lawfully held.

**Signed, dated and delivered this 3rd June, 2016**

**Ngaah Jairus**

**JUDGE**