REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 116 OF 2014.

N O ..... APPELLANT.

VERSUS

REPUBLIC..... RESPONDENT.

(*Being an appeal from the original conviction and sentence of Mig Moranga – PM in Criminal Case No. 1988 of 2009 delivered on 14th August, 2014 at Kakamega*)

J U D G M E N T.

1. N O (herein after referred to as the appellant) seeks to quash the conviction and sentence passed against him by the learned Principal Magistrate in Criminal Case No.1988/09, **REPUBLIC VS. N O** at Kakamega delivered by Mig Moranga – PM on 14th August, 2014. In the said case, the accused was convicted of offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya.

2. The particulars of the offence were that on the diverse dates between 8th and 12th October, 2009 at [Particulars withheld] village, [Particulars withheld] sub location in East Kakamega District within Western Province unlawfully and intentionally inserted his genital organ namely penis into vagina of S A, a girl aged 9 years. The appellant faced an alternative charge of indecent assault contrary to section 11 (1) of Sexual Offences Act. It was alleged that on diverse dates between 8th and 12th October, 2009 at [Particulars withheld] village, [Particulars withheld] sub location Khayega location of East Kakamega District within Western Province, unlawfully contacted his genital organ namely penis into the genital organ namely vagina and thighs of S A, a girl aged nine (9) years. The prosecution called 3 witnesses whose evidence is summarized below.

3. In determining this appeal, this court fully understands its duty. The question is what is the duty of a court of first appeal was answered in the case of **OKENO VS. REPUBLIC**.

4. I now turn to the evidence adduced before the trial court with a view of treating it to a fresh and exhaustive scrutiny. The evidence of the 3 prosecution witness is summarized below.

5. PW1, S A, class 3 student testified that on 8th October, 2009 the accused met her on her way to the river and pulled her into a house that has 2 rooms and defiled her. He threatened to kill her in case she told anyone. When she bled, he cleaned her with a rag and also cleaned some white discharge. When he heard some commotion from outside he ordered her to take jerrican and go to the river. On arrival home her mother was upset that she had delayed at the river and locked her in the house. She escaped through a window and went to accused person's place. Upon telling him what transpired, he told her to board a motor cycle at around 7 p.m. which took her to place called Mashenze and was alighted to go anywhere.

6. She decided to sleep by riverside and when a woman found her the following morning she explained her problem and the woman took her home. It is then she revealed what accused had done to her. She was taken to Iguhu Sub District Hospital where she was treated and report made to the police.

7. On cross examination, she said accused did not defile her at his house but at his aunt's house and could not say so initially due to fear that the accused would make good his threat.

8. PW2, Benta Otieno, a senior clerical officer at Kakamega provincial hospital testified that on 19th October, 2016 the complainant took treatment records from Iguhu District Hospital that she considered as she filled the P3 form. She examined PW1 and found PW1's vagina to be abnormally wide for a 9 year old girl which she observed to be evidence of earlier sexual contact. Her hymen was broken and she classified degree of injury as grievous harm due to the likely emotional effects it would have on the child. The treatment record and P3 form were produced as exhibits PExh. 1 a and PExh 1 b and post care form PExh 4 2.

9. PW3, PC Eric Mutuma of Kakamega police station testified that on 12th October, 2010, he was handed over the case by the I.O P.C. Jane Kariuki who had been posted to the Dadaab Police Station. He observed that on 18th October, 2009 the accused was taken to police station by APC Dickson Ireri and APC Levi Khayumbi attached to Khayega Police Post. The complainant and her mother accompanied them and had already attended Iguhu Sub District Hospital. Accused was booked in and taken to hospital for examination and after statement was recorded he was charged.

10. According to the PW1's mother, PW1 was born on 2nd April, 2000 and her dedication card was marked as PExh.3. On recall of the PW1 for accused to cross examine her, she said she had been defiled 3 times before by someone known to her and last one being on 8th October, 2009.

11. After evaluating the above evidence, the trial magistrate was satisfied that a prima facie case was established and put accused on his defence and complied with provisions of section 211CPC. The accused elected to give sworn testimony as stated in summary as follows. The accused testified that on 8th October, 2009 he never defiled PW1. He produced baptismal certificate DExh1 while narrating that he had gone to visit his mother at Khayega where he stayed for 2 weeks. On the 3rd week his mother A had quarreled with neighbours (2 women) when one of the children, a girl went on a second trip to the river, the mother beat her up and it was when the children ran away. The mother of the girl sent him to collect the girl but he refused.

12. He denied knowledge of where the girl was twice but she beat him up. He was later arrested at Khayega. He clarified that the mother at Khayega was his aunt and his home was in Shianda. He denied defiling PW1 or taking her to any house or wiping her after defiling her. The accused did not call any witness and thus closed defence at this stage.

13. The learned magistrate analysed the evidence of all the witnesses and the above defence and concluded that the appellant was guilty in respect of the second count and convicted him but discharged him in respect of the first count. He was sentenced to serve ten (10) years imprisonment. Aggrieved by the above decision, the appellant appealed to this court seeking to quash the conviction and sentence.

14. In the petition of appeal dated 25th August, 2014, the appellant mounted 5 grounds which can be compressed into 3 namely:-

(a) The trial magistrate failed to find that case was not proved beyond reasonable doubt;

(b) The court ignored the accused person's defence evidence and he was not accorded fair trial;

(c) The court violated Section 169 (1) CPC in that it failed to indicate in judgment points for determination.

15. The appellant during the hearing of the appeal was represented by OmbayeAdv. who had filed and served submissions dated 9th May, 2016. He relied on same entirety. The state counsel, Mr. Oroni relied on evidence on record. The appellant submits that the evidence by PW1 was at variance with the particulars of the charge sheet. That whereas she testified in chief the offence was at Chemakanga village. The charge talks of Shanyia village with 2 different places.

16. On cross-examination, she said the offence was not at Khayega but Maragoli which are also 2 different places. Further it is submitted that there was no evidence of bleeding as claimed by PW1 as her clothing ward during the ordeal were not produced in evidence or medical evidence to that effect.

17. Further it is submitted that the woman who took her hone next day after the day of alleged offence and her mother who was at home were not called to corroborate her evidence. Further the charge sheet talks of the PW1 age as ten (10) years yet no prove was adduced to prove the same.

18. Further, there are allegations of bias and unfair trial in that when it came to prove of PW1 age birth certificate was deemed a necessity but when the accused testified that he was under eighteen (18) the court indicated that birth certificate was not produced the same. Further prosecution was favoured in grant of adjournments but the accused was denied the same. There was no balance and fair trial thus provisions of Article 50 (1) (c) of Constitution were violated. The court violated section 11 (4) of Sexual Offences Act by sentencing accused 10 years while he was under eighteen (18) (a minor) and finally the court violated the provisions of section 169 CPC in that point of determination were not set out in the judgment. The state counsel relied on Evidence on record and sought appeal to be dismissed.

19. I have carefully considered the submissions made by both sides. I have also reviewed the evidence on record and the relevant Law.

Law.

20. Before even defence can be looked into, the prosecution has to found their case on the threshold of prove beyond reasonable doubt. Under section 124 of Cap 80 Evidence Act, a minor child victim of a Sexual Offence need not be corroborated. Her testimony if credible is enough to found a conviction. The court heard the complainant who was a singular eye witness. The court also cautioned itself as required by the law. The court found her intelligent girl.

21. The PW1 testified that on 8th October, 2009 the accused dragged and defiled her at his aunt's 2 room house. The accused confirmed at the time he had visited his aunt's house at the same place where PW1's parents are also living in the same place. She graphically described how accused took her to bed and removed her under pants. He started doing manners to her. He held her by neck and told her not to tell anyone at home or else he would kill her. He had sexual intercourse with her after undressing and removing his shorts.

22. She described how he took his 'thing' which he put in her thing which she use to urinate. She started bleeding where she urinates. Then he took a small rag and cleaned her with same to remove blood. Some white discharge was also coming out which he also cleaned from where she urinates. After wiping he heard somebody outside. She wore her underpants. Then he ordered her to take jerrican and go to the river.

23. The above testimony demonstrates clear evidence of defilement. During cross examination, her testimony was unshaken and the court believed her testimony. The trial court had benefit of seeing her demeanor and found no reason to doubt her story.

24. However, the medical evidence indicated that after doing high vaginal swab and all the other tests. There were no spermatozoa, glucose, protein or blood only observed a torn hymen and unusually wide vaginal opening for a girl of her age. There was evidence of repeated defilement but not of recent past. Thus negativing penetration.

25. The court on that account rejected count No. 1 and convicted the accused on alternative count of indecent assault. The court found that there was no reason for the young girl to lie to court and there was no evidence of ill will or previous differences with either accused or his family were disclosed. The court agrees with evidence on record that the issue of addressing PW1 and put the thing where she urinates from amounted to indecent assault to a child. The absence of evidence of her mother and that of the women who took her from river to home cannot lessen the value of PW1's evidence on the face of section 124 Cap 80.

26. On the issue of prove of her age, the P3 form, post rape care form and baptismal card, produced all indicated her age to be nine (9) years. The court also observed the child who stated she was nine (9) years and was born on 2nd April, 2000 and believed the same. The accused never challenged the above evidence or age.

27. The court relied on the case of CR. APPEAL NO. 255/2010 **MARIGI MUSENYA VS. REPUBLIC (2014) eKLR)** where L. Mutende – J. held that age of complainant could be proved by medical evidence, a birth certificate by a parent or guardian's observation or common sense. The court rightfully convicted the accused in respect of alternative count. However, when it came to sentencing, the court seems to have been in hurry to dismiss accused testimony that he was a minor i.e. under eighteen (18) years. The magistrate noted that court being Children's Court, it could be conscious of having accused age assessed yet it thereafter treated the allegation as an afterthought. This was a misdirection in law and fact.

28. The court thus violated the principles of fairness in not giving accused an adequate opportunity to prove his age at the time of the commission of the offence. This is so because if he was under eighteen (18) years he would not have been sentenced to serve jail sentence. The court therefore upholds conviction and sets aside sentence.

29. The case is remitted to the Chief Magistrate's Court, Kakamega for the appellant to tender evidence on his age and thereafter he be sentenced accordingly.

SIGNED, DATED, and DELIVERED at **KAKAMEGA** this **5TH** day of **OCTOBER ,** 2016.

C. KARIUKI.

JUDGE.

In the Presence of:-

..... for the Appellant.

.....for the Respondent.

..... Court Assistant