REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 47 OF 2011

JACKSON THUITA MUTUGI………………………….APPELLANT

VERSUS

REPUBLIC……………………………….…………...RESPONDENT

(Appeal from original conviction and sentence in the Chief Magistrates Court Criminal Case No. 37 of 2009 (Hon. D.O. Ogembo) delivered on 15th March, 2011)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **section 8 (1) (4)** of the **Sexual Offences Act, No. 3 of 2006.** The particulars were that on the 12th day of December 2009 at around 10 PM at [particulars withheld] village in Kieni West district within Central Province, the appellant intentionally and unlawfully, did an act of penetration to G M M, a girl aged 14 years.

He faced the alternative count of indecent act with a child contrary to **section 5(1) (b)** of the **Sexual Offences Act**. Here, the particulars were that on the 12th day of December, 2009 at around 10 PM at [particulars withheld] village in Kieni West district within central province, the appellant intentionally and unlawfully did an indecent act to G M M a girl under the age of 18 years by causing contact between his penis and her vagina.

The appellant was convicted of the main count and sentenced to 15 years imprisonment. On 24th of March, 2011 he appealed to this court against both the conviction and sentence. When he filed his written submissions in support of the grounds of appeal he amended those grounds to read as follows:

1. The learned magistrate erred in law and in fact by finding that the complainant was below 18 years old;

2. The learned magistrate erred in law and in fact in disregarding the appellant's defence of alibi;

3. The learned magistrate erred in law and in fact in convicting the appellant yet the charge sheet was defective;

4. The learned magistrate erred in law and in fact in convicting the appellant yet the complaint against him was not properly investigated;

5. The appellant's constitutional rights enshrined under article 5 a (2) (J) of the current Constitution and section 72 (3) (b) of the old Constitution were violated; and,

6. The prosecution case did not prove its case beyond reasonable doubt.

The appellant, as noted, acted in person and filed written submissions in support of these grounds of appeal. The state, on the other hand, conceded the appeal on the grounds that the trial against the appellant commenced before he was supplied with the statements and the charge sheet. He was also not supplied with the P3 form.

As always, and despite the state's concession to the appeal, it is imperative for this court, in exercise of its appellate jurisdiction to revisit the evidence adduced at the trial and come to its own conclusions regardless of the conclusions that the trial court may have arrived at but always bearing in mind that it is the trial court which had the advantage of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) EA 32).**

The complainant testified that she was aged 16 as at 16th December, 2010 when she testified. On 12th of December 2009 at about 4 PM she was on her way from Karugoini to [particulars withheld] village to visit her aunt. The appellant came by riding a motor cycle; he offered to carry her to Tanyai since he was travelling towards the same direction. However, rather than go to Tanyai, the appellant took her to his own house where he locked her and left. He came back at about 10 PM and defiled her.

On the following day at about 12:30 PM, the complainant asked him to take her to Nairutia; he took her to Ngethe instead, which was about half a kilometre from his house, and showed her the direction to Nairutia. While on her way she met four police officers who were apparently looking for her; one of them told her that he was an officer commanding station (OCS). After she told the police officers what had happened they accompanied her to Ngethe where they found the appellant and arrested him. They then went to the police station where the complainant recorded her statement and was issued with a P3 form the following day.

It was the evidence of the complainant that she did not know the appellant before but since she met him in broad daylight she could identify him well. She testified that the appellant had threatened to kill her if she ever screamed when she was in his house.

The complainant's father, **P W W (PW2),** testified that on 9th December, 2009 his daughter aged 14 sought for his permission to visit her aunt in [particulars withheld] village. She left at about 1 PM and in the evening of that day his sister, the complainant's aunt, **M M (PW3),** called to inform him that the complainant had arrived.

On 12th of December 2009 at around 8 PM, his brother **D K (PW4)** called him to enquire whether the complainant had come back home; he told him she hadn't. On 13th December, 2009, both D and M called him and informed him that the complainant was not with them and they were not aware where she was. He told them to report the matter to Nairutia police station.

On the evening of the same day, at about 7 PM, a police officer from Nairutia police station called the complainant's father and asked him to meet the officer the following day at Nyeri Provincial General Hospital. He went to the police station and found his daughter together with his brother, his sister and the appellant who was under arrest.

At his cross-examination, he testified that his daughter left home on 6th apparently of December, 2009 and that he was not aware for how long the complainant was with her aunt although he kept communicating with her while she was away. [particulars withheld] village where her sister lived was over 30 km away from his home.

M M N (PW3), testified that on 7th December, 2009 the complainant came to her home and remained there until the 10th December, 2009 when she asked her to go to her uncle because she was going away to attend a funeral; the complainant was to come back once her aunt had returned. On 12th of December, 2009, the complainant's uncle called the witness to enquire whether the complainant had come back to

her home. She told him that she hadn't and therefore he came to her home on 13th of December, 2009 to see whether they could trace the complainant. She testified that the complainant's uncle and her husband reported the disappearance of the complainant at Nairutia police station. On the same day, in the evening they were called to go to Nyeri provincial general hospital where they found the complainant, the appellant and the police.

During this witness' cross examination, she said that the complainant came to her home on 6th December 2009 but she found when the witness had gone to church and therefore she proceeded to her uncle's place; she only came back the following day and stayed until the 10th December, 2009 when she left. According to her, the complainant spent the 13th day of December, 2009 in the police cells.

The complainant's uncle **D K W (PW4)** testified that the complainant came visiting his home on 11th of December 2009 but she left for her aunt's place on 12th of December 2009 at about 12 noon. He called the complainant's aunt at 4.00 pm and 7.00pm to enquire whether the complainant had reached her home; she told him that she hadn't. The witness testified that his son told him that he had seen the appellant carrying the complainant on his motorcycle at about 4 PM on that day. He proceeded to his sister's home the following day and together they went to report the disappearance of the complainant at Nairutia police station. He informed the officer in charge of the station that the last person to be seen with the complainant was the appellant. The police proceeded to look for the complainant as this witness waited at the station; they later came back with the complainant together with the appellant. This witness also confirmed that the complainant spent the night of 13th December, 2009 at the police cells.

The doctor who filled the complainant's P3 form was Dr Karianjahi; the P3 form was produced in court on her behalf by **Dr Alex Muturi (PW5)** since she had left government service. This doctor testified that he had worked with her for one year and therefore he was familiar with her handwriting and signature. He testified that the complainant's age indicated in the P3 form was 14 years and the offence for which the complainant was being examined was allegedly committed on 12th December, 2009. The findings were that there were no injuries noted on the external genitalia but the hymen was broken. There was also a whitish discharge around vagina. A vaginal swab was done but no organisms or spermatozoa were seen. The complainant was put on HIV drugs and also on contraceptives. She was counselled and put on antibiotics. The form was signed on 17th December 2009.

Police Constable Michael Bowen (PW6) of Nairutia police station investigated the complainant's complaint. It was his evidence that on 13th December, 2009, he received a complaint from **D K (PW4)** and R K that their daughter, the complainant herein, aged 14 who had visited them had left for her aunt's place 12th of December 2009 but that she had not reached her home.

This officer, accompanied by the officer in charge of station inspector Langat proceeded to the home of the appellant at Mukachi village. When they arrived there they were informed that the appellant had left with the complainant with whom he had spent the previous night. They left and found the complainant at Mumetho trading centre. They interrogated her and she told them that on 12th December, 2009 at around 6 PM she was walking towards Tanyae when the appellant offered to take her there using his motorcycle but instead took her to his house where he defiled her.

The officer testified that on 13th December, 2009 they arrested the appellant at Nairutia trading centre and that he was identified to them by the complainant. On 14th of December 2009 he escorted the complainant and the appellant to hospital where they were examined. The officer also said that he knew the appellant before as a motorcyclist in passenger transport business at Nairutia; he, however, denied that he knew the complainant.

The investigations officer was cross-examined by the appellant on the issue of the age of the complainant; he testified that when the case was reported, the complainant is said to have been aged 16 but he later established that she was only 14 years old. According to him it is the father of the complainant who informed him of this age; he did not, however, establish whether the complainant had a birth certificate

and thus he could not produce any.

When he was put on his defence, the appellant testified that he had been at his brother's place at Nairutia since the 5th December 2009; on 13th December, 2009 he had hired a motorcycle to take him back home when he was arrested at the trading centre. He was taken to the police station and later he was charged. He denied having ever carried the complainant on a motorcycle since he could not even ride such a vehicle because he was physically handicapped. He also denied that he knew the complainant. With that the appellant closed his case.

The offence for which the appellant was convicted is defined and the punishment prescribed in **Section 8(1)** and **(4)** respectively of the sexual offences act; this section 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) ….***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

It is apparent from this provision that the main components of this offence are first, the act of penetration and second, the age of the victim of the sexual assault.

"Penetration" 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"*.

There was medical evidence that there was such partial or complete insertion into the genital organs of the complainant. In his findings, Dr Karianjahi established that though there were no injuries noted on the complainant's external genitalia, her hymen was broken and there was a whitish discharge around the vagina. According to the **Dr Alex Muturi** who testified on behalf of Dr Karianjahi, these findings were positive that the complainant had been defiled though I understood him to also admit that the perforation of the hymen was an injury that could be caused by anything and was not necessarily attributable to defilement. I also note from the P3 form that the type of weapon which could probably have caused the injury was not given and the degree of injury itself was also not assessed. The doctor's other important findings were that even after a vaginal swab was done, no organisms or spermatozoa were seen. It was also not established whether the whitish discharge around the complainant's vagina was a foreign element or emanated from the complainant's own organs.

My assessment of this evidence is that though there was evidence of a partial or complete insertion of the complainant's genital organs, it was inconclusive whether the insertion was by the genital organs of another person as to amount to penetration as defined under **section 2** of the **Sexual Offences Act**. In the absence of such evidence, it could not be concluded with any certainty that the offence of defilement was committed as defined under **section 8(1)** of the **Sexual Offences Act**.

The other component of this offence which I find was not proved beyond reasonable doubt was the age of the complainant. I note at the outset that the appellant contested the age of the complainant during the prosecution case and specifically cross-examined the investigations officer whether he obtained the complainant's birth certificate during his investigations; he also raised the issue in his submissions after the close of his own case.

In his judgement, the learned magistrate held that the age of the complainant had been proved by her own

evidence and the evidence of her father that she was aged 14. The estimated age of the complainant given in the P3 form was 14 years. Despite the appellant's contestation of this fact no other proof was given and, as noted, the learned magistrate only relied on the evidence of the complainant and her father to resolve this question.

Age is no doubt an important component of the offence of defilement under **section 8(1)** of the Sexual Offences Act and therefore it must be proved beyond reasonable doubt particularly so when an accused person contests it. It must be remembered that defilement is not defilement as understood in law unless it involves an act that causes penetration ***"with a child***". Reference to a "child" necessarily invites the interrogation of the age factor while considering whether one is guilty or not because it is this particular factor that defines whether one is a child and therefore whether the offender is culpable for an offence of defilement or not. My humble understanding of this particular provision of the law is that a conviction that is deficient of proof of age of the complainant, particularly where it is contested as was the case in the trial against the appellant, cannot and shouldn't be sustained.

Proof of age beyond doubt is also imperative not only because age is an important component in the definition of the offence under section 8 of the Act but also because punishment of an offence of defilement under that provision of the law is intricately intertwined with the age of the victim of a sexual assault. The severity of the sentence to be meted out upon conviction of an offence under **section 8** of the Act is directly proportional to the age of the complainant or the victim of the assault.

As I have held in my previous decisions on this question, proof of age in a charge of defilement under **section 8** of the Act is as necessary and as much important as proof of the ingredient of penetration; just as penetration has to be proved beyond reasonable doubt, so is the age of a victim of a sexual assault.

Proof of age 'beyond reasonable doubt' in sexual offences has been explained by the Court of Appeal in several decisions where this issue has arisen. The Court of Appeal has been categorical in these decisions that a mere word of mouth of one's age falls below the threshold of proof beyond reasonable doubt. This 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 perpetrator 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.

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; in that case it said:-

> **"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 Margaret Adhiambo 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 Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars***".

The complainant testified that she was aged 16 as at 16th of December 2010 when she testified. Her father testified that she was aged 14 when the offence was committed. There was no documentary proof of this age and the closest the prosecution came to providing documentary proof in this case was the production of a P3 form in which the "estimated age" of the victim was indicated; however, it has been noted that the Court of Appeal in **Dennis Abuya versus Republic (supra)** frowns upon such estimates as conclusive proof of one's age; apart from the requirement that the legal burden of proof rests on the prosecution which must discharge this burden beyond reasonable doubt it is also important to bear in mind that considering the severity of the sentences meted out against sexual offenders under section 8 of the Act the trial court should not be left with any lingering doubts about the victim's age whenever it has to convict.

For the reasons I have given I find that the age of the complainant was not proved beyond reasonable doubt and without such a proof, the appellant's conviction was, in my humble view, unsafe.

But even if I was to agree with the learned magistrate and the prosecution that the complainant was aged 14, then it would follow that the appellant was charged under the wrong provision of the law. **Sub-section (4)** of **section 8** of the Act, under which the appellant was charged and convicted is clear that it is only a person who is alleged to have committed an offence of defilement with a child aged between 16 and 18 that can be charged under this section; it states:-

> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

Assuming that the prosecution evidence was acceptable and that it was proved beyond reasonable doubt that the complainant was aged 14, then it is quite obvious that the evidence did not support the charge. Without the amendment of the charge at the appropriate time to have it conform to the evidence adduced at the trial, there is no doubt that the charge against the appellant was not proved at all.

I agree with the appellant that, at the very least, his conviction was based on a defective charge sheet. I am persuaded, for the reasons I have given, that the appellant's appeal is merited and it is hereby allowed. Accordingly, his conviction is quashed and sentence set aside; he is set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 4th day of November, 2016

Ngaah Jairus

JUDGE