**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 127 OF 2012**

**MOHAMMED OMAR MWAMASAI …….APPELLANT**

**VERSUS**

**REPUBLIC …….RESPONDENT**

***(Being an appeal from the original conviction and Sentence of the***

***Chief Magistrate's Court at Machakos by Hon. M.K. Mwangi (PM)***

***in Criminal Case No. 1364 of 2011 dated 15th September, 2012)***

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**JUDGMENT OF THE COURT**

1. The Appellant was convicted of Defilement contrary to **Section 8(1) (4)** of the **Sexual Offences Act, No. 3 of 2006.** He was sentenced to fifteen (15) years imprisonment. The facts were that on the 11th September, 2011 at ***[particulars withheld]*** Centre in Machakos District of Eastern Province intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of **E K** a girl aged sixteen (16) years and six(6) months old. Not being satisfied with conviction, the appellant filed the current appeal an urged the following grounds;

*a. The learned magistrate erred in law and in fact when he convicted the appellant on a charge that was defective and incompetent.*

*b. The learned magistrate erred in law and in fact when he misdirected himself on the applicable law and procedure.*

*c. The learned magistrate erred in law and in fact when he considered the evidence of PW1, PW2 and PW3 which was just a hear say.*

*d. The learned magistrate erred in law and in fact when he failed to consider the appellant's defence as against the prosecution's case.*

*e. The learned magistrate erred in law and in fact when he convicted the appellant on an incredible, unreliable and contradictory evidence.*

*f. The sentence was manifestly excessive.*

2. The appellant subsequently abandoned ground No. 6 on sentence, and submitted on the other grounds together as one. The appellant's case is that the prosecution did not prove its case beyond reasonable doubt, thereby abrogating the cardinal principles of criminal jurisprudence that where a doubt is expressed in criminal proceedings it must always be to the benefit of the accused person.

3. The prosecution called a total of five (5) witnesses. It is the appellant's case that PW1, PW2 and PW3 gave evidence which amounted to hearsay and which ought not to have been admitted by the trial court.

4. Parties filed submissions which I have considered. This being the first appeal, I have reviewed and re-evaluated the evidence given in the trial court, so that I can reach my own verdict in the matter. I therefore raise the following issues for determination;

*i. Whether the prosecution proved its case beyond any reasonable doubt.*

*ii. Whether the sentence meted was excessive.*

5. The prosecution called a total of five (5) witnesses. PW1 was the mother of the complainant. She testified that she was informed of the complainant's absence from home by her mother *(**A K**- who is the complainant's grandmother).* Being a parent, she **(PW1)** got concerned and decided to travel to Machakos. She went to Chumvi Police Station while accompanied by the complainant's younger sister **(PW3).** A report was made to the said station after which PW3 allegedly took her **(PW1)** to the Appellant's place of work. The police apprehended the Appellant and upon visiting his house, they did not trace the complainant **(PW2).** Later, PW1 found the complainant at home and upon examining her, allegedly saw blood in her private parts. She **(PW1)** identified a copy of PW2's Certificate of Birth, treatment notes and P3 form. She also testified that a blood stained inner wear belonging to the complainant was returned to her by the police.

6. In her testimony, **PW2** *(the complainant)* said that she met the appellant who promise to buy her body lotions. She allegedly went to his house that had scanty items and a mattress. She further testified that the Appellant gave her a whitish substance which she swallowed and thereafter lost her consciousness. Upon waking up, she found herself alone, dressed up and left for home. At home, she found her uncle and grandmother. She washed her blood stained clothes and kept them. According to her, she did not know the appellant.

7. The complainant's sister testified as PW3. She said that their grandmother had sent them *(PW2 and PW3)* to the market to buy flour. On their way to the market, the Appellant allegedly gave the complainant keys to his house. At that juncture, PW3 left for home after PW2 *(complainant)* told her she would find her at home. The following day, she accompanied PW1 to the Police Station and later to the Appellant's place of work.

**8. PW4** *(Police Officer)* visited the Appellant's place of work and abode. He did not find PW2. He instructed PW1 to look for PW2. After finding her at home, PW1 went to the Police Station with her (PW2). PW4 had both the Appellant and PW2 examined. He produced the treatment notes and Certificate of Birth as exhibits.

9. Finally, PW5 *(Doctor)* testified and produced the P3 form as an exhibit. He testified to the effect that PW2 was seen by **Doctor Mugo** for whom he was standing in. According to the Medical Report, there was no evidence of intoxication. The Appellant was not examined. The witness testified that PW2 *(complainant)* had been defiled and that the treatment notes said as much.

10. In as much as PW1's evidence amounted to hearsay, it was necessary evidence of the mother who was concerned about the whereabouts of her child. Indeed it is the steps she took that eventually led to the arrest of the appellant. However, her evidence provided only factual basis of the charge but was not the basis of proving particular elements of the offence.

11. Record also shows that the court conducted a *voire dire* procedure for the evidence of PW2 and PW3

who were minors, and the court established that they were intelligent enough to understand the virtue of telling the truth, and the role of oathing. The evidence of PW2 and PW3 were so compelling that it would not be correct to say that they amounted to hearsay. The elements of the charge to be proved in this matter were age, penetration and identification. The prosecution in its submissions has stated that those elements were proved beyond any reasonable doubt. However, the defence submitted that the charge of Defilement levelled against the appellant did not meet the legal threshold set out in the **Sexual Offences Act.** As regards the requirement of penetration, **Section 8(1**) of the **Act** states as follows:

> ***"A person who commits an act which causes penetration with a child is guilty of an offence named Defilement".*** **"Penetration" under Section 2 of the Act is defined to mean *"the partial or complete insertion of the genital organs of a person into the genital organs of another person".***

12. The Appellant's case is that no evidence was adduced to demonstrate that the complainant was penetrated by the Appellant or any other person. PW2's testimony was not specific as to the act of penetration. Evidence of sensory details, such as what a victim heard, saw, felt and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence even though it may be traumatic, strengthens the credibility of any witness's testimony and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in the present appeal, so submitted the Appellant.

13. The sum total of the Appellant's submission is that the appellant's conviction was unsafe and he urged the court to strike a blow for justice by quashing the said conviction and setting the Appellant at liberty.

14. In my view, it is trite law that the age of the victim can be determined by medical evidence and other cogent evidence; however it is only the doctor who can professionally determine the age of the victim in absence of any other evidence. In the present case it was PW1 evidence that the complainant was aged sixteen (16) years when the incident occurred, she further produced the complainant's Birth Certificate. Her evidence was corroborated by that of PW2 *(complainant)* who confirmed that she was born on **12th March, 1995** and therefore at the time of the incident she was aged sixteen (16) years and six (6) months.

15. The second ingredient is that of penetration by a particular assailant at the particular time. Penetration is defined under **Section 2** of the **Sexual Offences Act** as complete or partial insertion of a person's genital organ into the genital organ of another. In the instant case, PW2 *(complainant)* stated that she woke up and found herself in the house of the Appellant. She further testified that her skirt and under pant had blood stains, and she was feeling pain on her vagina. Her evidence was corroborated by PW5, the doctor, who examined her. He found laceration on her vaginal wall and discharge on the external genitalia. He formed the opinion that there had been penetration.

16. Lastly, the Appellant raised the issue of identification. However, this is a case of recognition as opposed to that of identification of a stranger; the complainant knew the appellant physically prior to the occurrence of the incident since she used to see him at Almansoon Hotel. PW2 evidence is corroborated by PW3 who was in the company of PW2 when the complainant met the appellant and she left them behind. PW3 further testified that the appellant was also well known to her as *"moud"* and in fact she is the one who directed the police to the Appellant's place of work.

17. In light of the foregoing, this court finds that the appellant's grounds of Appeal are devoid of any merit since the trial prosecutor proved his case beyond any reasonable doubt as the evidence tendered was credible, consistent.

18. This appeal has no merits and is dismissed. On sentencing this court has no discretion. The minimum sentence of fifteen (15) years was given. That cannot be reduced.

**THAT** is the judgment of the court.

**DATED** AND **DELIVERED** AT **MACHAKOS** THIS **2ND** DAY OF **NOVEMBER, 20**16.

**E. OGOLA**

**JUDGE**

**In the presence of:**

Mr. Machogu for State

Mr. Mwema holding brief for Mr. Ngolya for accused

Court Assistant – Mr. Munyao