**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 177 OF 2010**

**JUSTUS MWANGI GAKUO…….....……APPELLANT**

**VERSUS**

**REPUBLIC……..…….....….RESPONDENT**

***(Being an appeal against conviction and sentence in Nyeri Chief Magistrates Court Criminal Case No. 18 of 2009 (Hon. Nyakundi) on 14th July, 2010)***

**JUDGMENT**

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1) (2)** of the **Sexual Offences Act No. 3 of 2006**. In the particulars of the offence, it was alleged that on 9th day of June 2009 at ***[particulars withheld]*** village in the then Nyeri District, within the then Central Province the appellant intentionally and unlawfully did an act which causes penetration to M W a child aged 9.

At the conclusion of the trial the appellant was convicted and sentenced to life imprisonment.

He has now appealed in this court against the conviction and sentence and in his petition he has raised the following as his grounds of appeal:-

1. The learned magistrate erred in law and in fact in convicting the appellant despite the fact that his constitutional rights under **section 72(3)(b)** of the **Constitution** were violated because he was detained in police custody for fourteen days before he was brought to court;

2. The learned magistrate erred in law and in fact by failing to inquire into the source of light available at the locus in quo for identification;

3. The learned magistrate erred in law in convicting without consideration that there was no medical report determining that the appellant was the perpetrator of the offence;

4. The learned magistrate erred in law and in fact in convicting the appellant without due regard to the fact that there were no injuries sustained by the complainant; and

5. The learned magistrate erred in law and in fact when he failed to consider the appellant's defence.

Being the first appellate court, this court is under the legal obligation to consider the evidence at the trial afresh and come to its own conclusions which ultimately may or may not be consistent with the

magistrate's court factual findings. I am cautious, however, that it is only the magistrate's court that had the advantage of seeing and hearing the witnesses and therefore was in a better position to assess such aspects of their evidence as their demeanour and candour**. (See Okeno versus Republic (1972) EA 32).**

The complainant, **M W (PW1)** testified that she was ten years old as at the time she testified on 22nd March, 2010; she gave a sworn testimony after the trial magistrate satisfied himself that she understood the nature, import and the meaning of an oath.

It was the complainant's evidence that she knew the appellant and that she had known him for a long time because he always hawked milk within the area she lived.

On the night of 9th June, 2009, so she testified, she was sleeping in the same room as her brother J T and one J K, whom she described as her "grandmother's child". She shared a bed with her grandmother who was apparently away when they retired to bed. They slept without locking the door of their house and also left the lamp on because, according to the complainant, they were expecting her grandmother back on that particular night.

The complainant testified that on that night the appellant entered the house, put out the lamp and defiled her. The appellant gagged her using papers such that she could not scream. As the appellant assaulted the complainant, her brother went to call the landlord but the appellant is said to have disappeared before the landlord arrived.

The complainant told her grandmother of the attack but that it was her aunt who took her to Nyeri Provincial General Hospital the following day and later reported the attack to the police.

The complainant also testified that the appellant had defiled her on several occasions before, whenever she went to search for firewood, and that he had threatened her with death if she dared tell anybody.

**J T (PW2)** who was also a minor and the complainant's brother testified that they shared the same house with the complainant and that on 9th June, 2009, at 10.00 pm they were asleep in that house when the appellant came by. The witness asked the appellant why he was in their house yet their mother had not arrived. The appellant is said to have put out the lamp and gone to the complainant. Thereafter, he heard the complainant crying and it is then that the witness went to seek help from the landlord, one **John Warutumu** who lived in the same plot as the complainant's family. They did not, however, find the appellant as he is said to have jumped over the fence and ran away. This witness reported this incident to his aunt, one Mumbi and his sister, one Wanjira. They in turn went and reported the matter to the police, who arrested the appellant on the night of 10th June, 2009.

It was this witness' evidence that their mother, who I suppose is the same person that he complainant referred to as her grandmother did not come back on the night of 9th June, 2009 as anticipated and therefore they opted to lock the door and sleep after the attack on the complainant.

The landlord, **Raphael Warutumu (PW3)** was a fifty eight year old man who testified that on the 9th June, 2009 at 10.00 pm while he was asleep at his house J T came to his house and told him that the appellant was in their house and he wanted him (the landlord) to ask him to go away. He woke up and went to the house. He found the door open. He said that he saw someone run away but he could not tell whether it was the appellant. It was his evidence that he hadn't seen the appellant before.

The complainant's grandmother was **P M I (PW4)** and she testified that she knew the appellant because he was employed in her neighbourhood. It was her evidence that on 9th June, 2009 she was working at a councillor's home. At 12.00 pm she found the complainant and the grandmother of the complainant at a place that is not clear from the record. Nevertheless, wherever she found them, the complainant was seated and upon interrogation she told her that the appellant had defiled her. She took the complainant to the police station to lodge the report and thereafter went to hospital where the complainant was treated and discharged.

The investigations officer **Esther Kingori (PW5)** testified that on the 10th June, 2009, she was on standby duties at Nyeri police station when at 10.00 pm she received a call from the control office to the effect that members of the public wanted to break into the appellant's house at Kandara. She proceeded to the scene together with Corporal Kahia and her driver Police Constable Gichane. They found members of the public surrounding the appellant's house. The appellant was ordered to open the door which he did. The appellant was then arrested and escorted to Nyeri police station.

The investigations officer interrogated the complainant who informed her that she had been defiled by the appellant on 9th June, 2009 at 10.00 pm while sleeping with her brother and uncle. According to this witness the appellant entered the complainant's family house and "removed" **T (PW2)** from there. He then put out the lamp and defiled the complainant. The appellant is said to have ran away when **T (PW2)** went to call for help.

According to the investigations officer, the matter was reported to the police the following day.

The doctor who treated the complainant at Nyeri provincial general hospital was **Dr John Mwangi Wanjiku (PW6).** It was his testimony that the child was presented to him on 12th June, 2009. Upon examination, the child looked normal. There were no lacerations or tears on both labia majora and labia minora. The hymen was already broken but there was no discharge. There were spermatozoa detected even after the vaginal swab. There was bacterial infection and according to the doctor the infection was as a result of penetration; it was his opinion therefore that the complainant had been defiled. The P3 form in which the doctor's findings and his opinion were made was admitted in evidence as the only exhibit produced by the prosecution.

In his defence, the appellant gave unsworn testimony to the effect that he was a causal labourer at Kiamwathi and at the time of his testimony he had been in employment at that place for three years. According to him, the villagers in Kiamwathi considered him an outsider and that they had vowed to have him sacked from his employment. He denied committing the offence and asked the court to be "lenient" on him and "forgive" him.

That was also that was proffered as evidence both by the prosecution and the defence.

Now, **Section 8 (1)** and **(2)** of the **Sexual Offences Act** under which the appellant was charged 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) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

Two critical elements which must be established before one is convicted of the offence of defilement under this section are first, the penetration and second, the age of the victim.

"Penetration" as a term of art 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"*.

Evidence, which in my view was sufficient to prove 'penetration' as defined in law, was led to the effect that the complainant's genital organs were "penetrated" as understood under **section 8(1)** of the **Act.** The complainant herself testified that she had been defiled not just on the night of 9th June, 2009 but that she had also undergone the same ordeal on previous occasions allegedly at the hands of the appellant. Her evidence in this regard was corroborated by that of **Dr Mwangi Wanjiku (PW6)** who testified that although the complainant appeared normal and that there was no evidence of any laceration on either her

labia minora or labia majora she had a bacterial infection which, in the doctor's opinion, was secondary to penetration and in any event her hymen was also broken. Since this evidence was neither challenged nor controverted, I am convinced that the learned magistrate came to the correct conclusion when he held that the prosecution had proved to the appropriate standard that the complainant had been defiled in the manner contemplated under **section 8(1)** of the Act.

The next element whose proof should also have been found material to sustain a conviction under **section 8(1)** and **(2)** of the Act is that of the age of the complainant. It is material because 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 consideration of the age factor in contemplation of whether one is guilty or not because it is this particular age factor that defines whether one is a child and therefore susceptible to 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 is virtually implausible.

Equally important is the understanding that punishment of an offence of defilement under **section 8(1)** 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.

In my humble view, therefore, 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 attack under this provision of the law.

One may ask, and legitimately so, what does proof beyond reasonable doubt entail in proof of age where such proof is necessary in establishing an offence under **section 8** of the **Act?** Would the complainant's word of mouth or that of her parents (or any of them) or her guardian's be sufficient?

In the two Court of Appeal decisions that I have come across, and where this issue has arisen, the Court of Appeal is of the view that the word of mouth alone irrespective of whose mouth the word is coming from is insufficient and proof of age in a trial of an offence under **section 8** of the Act demands some sort of documentary proof. 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 villain 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***".

Coming back to the evidence in the trial against the appellant, there is no evidence apart from what the complainant herself said and the evidence of her alleged grandmother there was no proof that the complainant was aged 9. 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. As noted, the Court of Appeal in **Dennis Abuya versus Republic (supra)** frowns upon such estimates as conclusive proof of one's age; if one has to spent the rest of his life in prison because of the age of his victim, as was alleged in the trial against the appellant, there must be something substantial that would not leave any doubt of the victim's age in the mind of the trial court. I find that the age of the complainant was not proved beyond reasonable doubt.

Without the establishment of the age of the complainant, a conviction cannot be sustained under **section 8** of the Act and I am inclined to conclude that the appellant's conviction cannot be sustained without due regard to the question of whether this particular aspect of the prosecution case was proved beyond reasonable doubt; the conviction was, in my view, unsafe.

It would have been allow the appeal and stop at this point but I need to say something about the rest of the evidence against the appellant, assuming that the complainant's age was not a factor in the conviction or acquittal of the appellant.

The complainant testified that when her grandmother came back she informed her of the appellant's attack on her but that it was her aunt who took her to hospital the following day when she went to report to her the same incident. The person who testified as the complainant's grandmother was **P M I (PW4);** this witness described herself in her evidence in chief as the complainant's grandmother. In the same testimony, however, this particular witness testified that on 9th June, 2009, at 12.00 noon, she found the complainant and "her grandmother" at some place which is not clear from the record with members of the public. She interrogated the complainant who told her that the appellant had defiled her. She took it upon herself to report the incident to the police and take the complainant to hospital.

From the evidence of **P M I (PW4),** it is not clear who the complainant's grandmother was; while she alleged that she was the complainant's grandmother she goes further to say that she found the complainant with "her grandmother". The question that was not answered is which of these two "grandmothers" lived with the complainant? Was it not necessary for this particular grandmother to testify, if not for anything else, to corroborate the complainant's evidence that indeed she lived with the complainant and that she was away on the fateful night and also that she received the complainant's complainant when she came back?

Talking of the complainant's grandmothers, it is not clear from the evidence whether the one alleged to be living with the complainant either came back on the same night or on the day after. The complainant's testimony seems to suggest that her grandmother came back the same night; she said that her grandmother came back and she informed her of the attack but that the following morning she went to her aunt's place to report the same incident. James Thungu (PW2) was, however, categorical that his mother, who must have been the same person that the complainant was referring to as her grandmother did not come back the same night and therefore they decided to lock the door and sleep.

Another disturbing aspect of the prosecution evidence was the testimony by **P M I (PW4),** that the complainant had been defiled as at 12.00 pm on 9th June, 2009. This appears to contradict the evidence of the complainant that she was defiled on the same date but at night, long after 12.00 pm. This inconsistency may not appear to be material but it is a component of other inconsistencies in the prosecution case whose sum total would create a reasonable doubt whether the complainant was defiled by the appellant as alleged.

**P M I (PW4)** also testified that she took the complainant for treatment. It is not clear from the record when the complainant was taken for treatment because no treatment cards or records were produced. Although a P3 form is indicated in the record to have been produced and admitted in evidence, I could not find it from the record.

Be that as it may, the doctor who examined and treated the complainant and subsequently filled the P3 form, Dr John Mwangi Wanjiku testified that the appellant was presented to him on 12th June, 2009, almost three days after the event. If the complainant reported the attack on 10th June, 2009, there is no reason given for the delay in her treatment; it is possible that a lot could possibly have happened in the intervening period, including the complainant being defiled by somebody else other than the appellant, and such possibilities cast doubt on whether the appellant could have defiled the appellant as alleged or at all. Whenever such possibilities arise, it cannot be said that the prosecution proved its case beyond reasonable doubt and the accused person is always entitled to the benefit of doubt in such circumstances.

My conclusion is that the appellant's appeal is merited and I am persuaded to allow it. 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 December, 2015**

**Ngaah Jairus**

**JUDGE**