



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.60 OF 2009**

**BETWEEN**

**PHILIP MOSETI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from original conviction and sentence of the SRM's Court at Keroka in*

*Criminal Case No.430 of 2008 – by Hon. J. Were, SRM, delivered on 3<sup>rd</sup> April, 2012)*

**JUDGMENT**

**Introduction**

1. The appellant herein, Philip Mosesti was charged with the offence of defilement of a child under **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act, No.3 of 2006**. The particulars of the offence are that on the 10<sup>th</sup> and 11<sup>th</sup> days of May, 2008 at *[particulars withheld]* market he defiled one E M M, a child aged 15 years.
2. Having denied the charge, the case went to full trial during which the prosecution called a total of 6 witnesses though PW3 did not give any substantive evidence. The complainant, E M M testified as PW1, while PW2 was A G, the mother of the complainant. PW3 was Thomas Omwata though he did not give any substantive witness. PW4 was E M , a brother to the complainant while Joel Ongara, a clinical officer at Masaba District Hospital testified as PW5. The last witness, PW6 was Number 75782 Police Constable Daku Nuno. He is the one who investigated the case.

**The facts and the Evidence by Prosecution**

3. The complainant testified that she was a standard 8 pupil at *[particulars withheld]*

Primary School and that during the year 2007, the appellant herein always followed her whenever she was going to school and asked her to become his girlfriend. She agreed to become his girlfriend, though the appellant and the complainant's grandfather were brothers. In essence therefore, the complainant was the appellant's niece in the second degree of consanguinity.

4. She stated that on the 7<sup>th</sup> March 2008, the appellant asked her to accompany him to *[particulars withheld]* Market for some discussions on the question of their friendship, and to spend time together. She also testified that she used to sleep with the appellant. She said they used to meet at *[particulars withheld]* on market days and would sleep together in the tea plantations and then go

- back home. That the appellant also bought a dress for her. The complainant also testified that the affair between her and the appellant remained a secret between them and she did not tell her parents about it because the appellant had told her not to do so.
5. The complainant went on to tell the court that on 7<sup>th</sup> May 2008, the appellant first took her to **[particulars withheld]** market and then later to the house of some lady where they stayed until 10<sup>th</sup> May 2008 on the strict instructions of the appellant. The appellant also used to go to the lady's home and would sometimes telephone the complainant who had her father's phone with her. On 10<sup>th</sup> May 2008, the complainant went to **[particulars withheld]** market and met the appellant. By that time, the appellant had become aware that the complainant's parents were looking for her, so he advised the complainant to escape. The complainant ran to her friend's home which was near her parents' home.
  6. The complainant also testified that on 11<sup>th</sup> May 2008, the appellant went to the home where she had spent the night, gave her money and advised her to run to her aunt's home, but before she escaped to her aunt's home, the complainant's mother, A G , PW2 (A) and her brother E M , PW4 (E) found her and took her home. The complainant stated that on one occasion, she spent a night at the appellant's home
  7. The matter was thereafter reported to the area chief and later to the D.O. After the complainant had revealed the details of her escapades with the appellant, the appellant was arrested and taken to Ramasha police station. After recording her statement, the appellant was taken to hospital at Keroka.
  8. The complainant was cross examined at length by the appellant's counsel. She confirmed during the testimony that she and the appellant enjoyed an intimate relationship between July 2007 and 11<sup>th</sup> May 2008 when the relationship was discovered and busted. That the relationship was oiled with gifts of cash and clothing from the appellant. She also stated that it was the appellant who told her to take her father's mobile phone on 8<sup>th</sup> May 2008 so they could communicate easily, and that on 10<sup>th</sup> May 2008, she and the appellant spent about 30 minutes at a lodging at **[particulars withheld]** market; although it was on a school day when she was supposed to be in school.
  9. The complainant also testified during cross examination that she had made trips to Nairobi, where her father worked, and to Molo but denied that she had truanted. She denied that she had stolen clothes from one Isaac Onchiri. The complainant also said that she was at the time of the hearing of her case, expecting the appellant's baby though she could not say the point in time at which she became pregnant. She denied that she had many boyfriends, and said that the only person she had slept with on many occasions was the appellant.
  10. Ann testified of how the complainant ran away from home on the 7<sup>th</sup> May 2008 after taking her father's phone. She stated that on the 9<sup>th</sup> May 2008, she learnt from a sister of the appellant by the name F that the complainant was at **[particulars withheld]**. On going to **[particulars withheld]**, A and her sister S met the appellant and asked him about the complainant's whereabouts and were told she was at T O's, but they did not find her there.
  11. On the 10<sup>th</sup> May 2008, A said she went to Nyasike Tea Buying Centre and found the complainant charging her (complainant's) father's phone. A took the complainant home and also interrogated her and was told that the appellant had taken the complainant for a wife and intended to take her to Molo. A also testified that she knew that the appellant had taken the complainant as a wife since 2007, as the accused used to go to her home and ask for the complainant.
  12. A also testified that on 1<sup>st</sup> August 2007, the appellant took the complainant to his house and that when the village elder knew about the affair, he warned the appellant about it, but that the relationship did not stop because the appellant had told the complainant that if she cut off the relationship, she would miss many things.
  13. A also testified that she reported the matter to the area Assistant chief. The Assistant Chief referred the incident to the area chief who summoned the appellant to Masimba. Both the appellant and the complainant were called before the D.O. for interrogation. The appellant was thereafter arrested after both Ann and the complainant had made their statements.
  14. During cross examination, A told the court that the complainant was born in 1993. She also testified that the complainant went missing from home for four (4) days. She also stated that when

- she went to Nyasike on the 11<sup>th</sup> May 2008, both the appellant and the complainant were there though the appellant was seated a safe distance away from where the complainant was charging her phone. A also testified that the father of the appellant is a brother to the complainant's paternal grandfather. A denied that her daughter stole a chicken sold it and got fare to go to Molo. She however testified that she gave the complainant money to go to Nairobi. A denied that the complainant was promiscuous and ill-mannered, though she admitted that when she took her daughter to hospital on 3<sup>rd</sup> June 2008, she (complainant) was found to be expectant.
15. The complainant's brother E M (E) testified that on 7<sup>th</sup> May 2008, she escorted the complainant to school in a bid to recover the phone the complainant had stolen from their father on the 6<sup>th</sup> May 2008. However as he waited outside the classroom for the complainant to bring the phone which she alleged was with one of her fellow students, the complainant escaped through a window, so he went back home without the complainant and without their father's phone.
  16. PW4 corroborated A's testimony on how they had searched for and finally found the complainant at Nyasike Tea Buying Centre where complainant was charging her father's phone. E also stated that according to the complainant, the appellant had taken her to Nyasike so he could give her money to make her escape to Molo.
  17. During cross examination, E stated that rumours were rife in the area about the affair between the appellant and the complainant. Eric also stated that he saw the appellant on 10<sup>th</sup> May 2008 at [particulars withheld] and on 11<sup>th</sup> May 2008 at Nyasike. E denied that he was a liar. He also denied that he had any disagreements with the appellant.
  18. Joel Ongara, PW5, a clinical officer at Masaba District Hospital completed the P3 form issued to the complainant. He stated that on physical examination, he established that the complainant's hymen was broken, after what the complainant told her was a defilement ordeal; but with no other abnormality. The P3 form was produced as **P. Exhibit 1**.
  19. PW5 also testified that he examined the appellant and filled a P3 form on him. PW5 stated that the appellant was in a stable state of mind but had bruises on the glans penis. An HIV test carried out on both the appellant and the complainant was negative. The syphilis test was also negative. The P3 form on the appellant was produced as **P. Exhibit 3**. The respective examinations were done on 2<sup>nd</sup> June 2008.
  20. IN response to questions put to him by counsel for the appellant, PW5 stated that the examination he carried out on both the complainant and the appellant was not exhaustive because it did not include a DNA test and further that the examination was not exhaustive because it was done some 3 weeks after the alleged defilement. PW5 stated that a DNA test would be necessary to determine the paternity of the child after birth of the child but not before. He also said that spermatozoa could not be seen because the medical examination was done 72 hours after the alleged incident. PW5 was however categorical that there was penetration of the complainant's vagina because her hymen was broken; and further that the complainant and the appellant must have had sex before the alleged incident.
  21. PW5 confirmed that the examination he carried out on the complainant confirmed that she was pregnant though she did not have any bruises on her external genitalia.
  22. PW6 was Number 75782 Police Constable Daku Nuno (PW6) of Ramasha police station. He investigated this case after a complaint was made to the police station on 30<sup>th</sup> May 2008 alleging that the complainant had been defiled by the appellant.
  23. PW6 stated that he booked the report and also took statements from witnesses. He also issued P3 forms for both complainant and the appellant. PW6 stated that he charged the appellant after the complainant's parents confirmed that she was 15 years old.

### The Defence Case

24. At the close of the prosecution case, the appellant was put on his defence. He gave sworn evidence and called one (1) witness. The appellant testified that the complainant was his niece, being a daughter to the appellant's cousin. He denied that he met the complainant on 10<sup>th</sup>, 11<sup>th</sup> or 9<sup>th</sup> May 2007 because he was at his home grazing his animals. The appellant stated that it was P A who told him that one of his cousin M's children had run away from home and that she was with PA's sister. That is when he asked F O to inform the complainant's family and that finally

- the child who had gone missing was found. The appellant denied A's allegations that he had been found together with the complainant.
25. The appellant also testified that on 30<sup>th</sup> May 2008 at about 6.00 a.m., he received a report from the area chief requiring him to go to Masimba chief's office. When he went there, he was arrested and taken to Ramasha police station, and later to Masaba District Hospital. He denied that he was examined at the hospital.
26. When asked some questions on cross examination, the appellant stated that though he knew the complainant as his cousin's daughter and neighbour and despite having known her for the whole of her life, he had never said hello to her. He also stated that he had a dispute with A over the usage of his mobile phone arising from a complaint by his wife as to why he (appellant) always took the phone to A during the night.
27. The appellant denied being a boyfriend to PW1, let alone even asking her to be his girlfriend since she was his niece. He also denied ever meeting with the complainant at Masimba market as alleged. He denied going to Nyasike on 11<sup>th</sup> May 2008. He testified further that he did not even know the complainant. He also told the court that he did not have any grudge with E.
28. When taken to task during cross examination, the appellant stated that this whole dispute arose because of the disagreement over the use of his mobile phone between himself and Ann.
29. DW2 was P A N, the son of T O, PW3. He testified that he and the appellant together with the complainant's father one M all belong to the same family. That on the 9<sup>th</sup> May 2008, PW3 sent him to the home of M with information that one of M's children was with PW3's children and that M's family should fetch her from there if they were looking for her, though DW2 admitted he had himself not seen the child in question. That as he made his way to M's home, DW2 met the appellant and gave him similar information about M's child because he had not found anyone at M's home. He also testified that after a brief exchange with the appellant, he (DW2) went his way.

#### Judgment by the Trial Court

30. After hearing all the evidence that was placed before him together with all the submissions and after a careful analysis of the same, the trial court reached the conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt. The learned trial court found that the evidence adduced on behalf of the prosecution was credible, coherent and consistent in regard to the charge against the appellant. The appellant was thus found guilty as charged, convicted and sentenced to 2 years imprisonment, suspended.
31. By a ruling dated 5<sup>th</sup> March 2010, in Criminal Revision No. 6 of 2009, this court (Makhandia, J as he then was) made an alteration in the trial court's finding as well as the sentence. The appellant was found guilty of defilement of a child contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act** and accordingly sentenced to twenty (20) years imprisonment w.e.f. 13<sup>th</sup> March 2009. The High Court Revision order was subsequently implemented.

#### The Appeal

32. Being aggrieved by both conviction and sentence, the appellant seeks to have the entire judgment of the trial court overturned on the following grounds:-
1. *The trial magistrate erred in law and facts [in] passing judgment against the weight of evidence on the face of the records.*
  2. *The trial magistrate erred in law and facts [by] passing out judgment in total disregard of [the] appellant's case.*
  3. *The trial magistrate erred in law and facts by passing out judgment without giving reasons for the same.*
33. The appellant therefore prays that the appeal be allowed, the conviction quashed and the sentence of 20 years imprisonment be set aside or in the alternative, this court be pleased to pass such other orders as the ends of justice may call for.

## The Submissions

34. When this appeal came up for hearing on 6<sup>th</sup> November 2013, Mr. Rogito for the appellant collapsed the 3 grounds of appeal into 2 and argued grounds 1 and 2 together. Counsel submitted that the evidence of the complainant, A and E which evidence formed the basis of the appellant's conviction in the court below was all hearsay evidence and as such the trial court ought not to have relied on it. Counsel submitted that the complainant was not a reliable witness in so far as she denied stealing her father's mobile phone while both A and E confirmed that she had stolen the mobile phone.
35. Counsel also submitted that the complainant was in the habit of disappearing from home and that her explanation of where she spent those nights she ran away from home, and especially on the night of 10<sup>th</sup> May 2008 left a lot to be desired.
36. Regarding the medical evidence by PW5, counsel for the appellant submitted that the said evidence showed that there had been penetration and that PW1 was pregnant, though there were no bruises on PW1's labia majora. Counsel submitted that PW5's evidence did not connect the appellant with the offences.
37. Finally, counsel submitted that the Investigating Officer did not do a good job in this case, as he did not even call the arresting officer to say why the appellant was arrested.
38. In response to the appellant's submissions, Mr. Shabola for the Respondent opposed the appeal and submitted that the evidence upon which the trial court based the appellant's conviction was both credible and overwhelming. Counsel referred to the testimonies of the complainant, Ann and PW5 and said that from all the above evidence, it was clear that:-

- *there was penetration;*
- *the victim was a girl aged 15 years;*
- *the appellant was someone who was well known to PW1 both as a relative (uncle) and a neighbour;*

and that in essence all the ingredients of the offence of defilement were proved beyond any reasonable doubt. Counsel urged this court to dismiss the appeal in its entirety.

## Mandate of this court

39. Since this is a first appeal, this court is under a duty to reconsider and evaluate all the evidence on record afresh with a view to reaching its own conclusions in the matter. When carrying out this mandate, this court is mindful of the fact that it does not have the opportunity the trial court had of seeing and hearing the witnesses. The court has also to remember that where a finding by the learned trial magistrate is based on facts whose proof is premised on the demeanor of any of the witnesses who testified, then this court must exercise caution in deciding whether or not to overturn the judgment of the trial court. See generally **Pandya –vs- R[1957] EA 336; Mwangi – vs- Republic [2004] 2 KLR 28; Ruwala –vs- R[1957] EA 570 and Ngui –vs- Republic [1984] KLR 729.**

## Findings and Conclusions

40. This court has now carefully reconsidered and evaluated the evidence afresh. It has also considered and weighed the judgment of the learned trial court in which the trial court found that the complainant and the appellant, who were niece and uncle, had had an affair since July 2007 and that on 10<sup>th</sup> May 2008, the two made love in a lodging at [particulars withheld] market, and that by 3<sup>rd</sup> June 2008, when the complainant was examined, she was found to be 4 months pregnant.
41. After a careful analysis of all the evidence on record, the question that arises for determination is whether the findings by the learned trial magistrate that the prosecution proved its case against the appellant beyond any reasonable doubt is supported by the evidence on record.
42. To prove the offence of defilement under **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act**, the prosecution must prove penetration and must also prove that the complainant is

- aged between twelve and fifteen years. The prosecution must also prove that it was the appellant and the appellant alone who committed the act that resulted in the breaking of the complainant's hymen and the subsequent pregnancy which was found to be 4 months old as at 3<sup>rd</sup> June 2008.
43. From the evidence on record, I am not persuaded that the prosecution proved its case against the appellant beyond any reasonable doubt. First and foremost, the complainant told the court that she became a lover of the appellant sometime in July 2007 and that the appellant bought clothes for her and gave her cash gifts; that the complainant's mother, A, knew of the relationship and saw the clothes. When A testified, she did not mention anything about the clothes the appellant is said to have bought for her daughter. During her testimony, A also said she had no relationship with the complainant. Perhaps this statement was a mistake on the part of the court. I have also reconsidered the evidence of E, most of which is hearsay evidence. Considering the testimonies of the complainant, A and E, I found that there is no consistency. I also find that the appellant and A were not on talking terms, either because of the use of the appellant's phone by A or because of the alleged affair between the appellant and the complainant. The benefit of the doubt in this case goes to the appellant.
44. In her testimony in chief, the complainant told the court that she slept regularly with the appellant since July 2007. The complainant gave general statements about that relationship except for the month of May 2008 when she mentioned having slept with the appellant on 10<sup>th</sup> May 2008 for about 30 minutes at a lodging at [particulars withheld] market. There is other evidence on record to show that the complainant went to Molo and to Nairobi for reasons that are not disclosed. The complainant also testified that there was bad blood between her parents and the appellant, and in my considered view, the possibility of a frame up cannot be ruled out.
45. Why do I say so? The alleged offence took place on 10<sup>th</sup> and 11<sup>th</sup> day of May 2008, and yet the complainant, who was found at Nyasike on 11<sup>th</sup> May 2008, was not taken for treatment until some three weeks after the alleged incident. The prosecution did not attempt to explain why the delay was so long. Although the appellant's defence may not be true, I find that this whole case by the complainant against the appellant could have been motivated by factors other than the allegation that the appellant had turned the complainant into a wife.
46. Secondly, in his judgment, the trial court seemed to shift the burden of proof from the prosecution to the appellant when he says at paragraph 2 on page 8 of the judgment: **"PW1 narrated the occurrences of 7<sup>th</sup> to 11<sup>th</sup> May. The accused person however did testify mainly as to the occurrences of 9<sup>th</sup> May when he met DW2. He has not specifically responded to the allegations in regard to his whereabouts on the 10<sup>th</sup> and 11<sup>th</sup> May. Where was he on these 2 days?"** Again at paragraph 5 of the judgment on page 8, the learned trial magistrate says; **"PW1 had testified that she once was at the home of F. F is an acquaintance of DW1, the accused. F had indicated that the accused knew where PW1 was to PW2 and PW4. Why didn't the accused avail her to rebut that evidence?"**
47. The legal principle is that in criminal cases, the burden of proof never shifts from the prosecution. Even in cases where an accused person puts forward the defence of alibi, it is upon the prosecution to adduce evidence to dislodge such a defence.
48. In the premises and for the reasons above stated, the judgment of the learned trial magistrate cannot stand. Accordingly the appeal is allowed. The conviction is quashed and the sentence is set aside.
49. Unless the appellant is otherwise lawfully held, he is to be released from prison custody forthwith.
50. Orders accordingly.

**Dated and delivered at Kisii this 13<sup>th</sup> day of February, 2014**

**R.N. SITATI**

**JUDGE.**

In the presence of:

Mr. Minda for Mr. Rogito (present) for Appellant

Miss Cheruiyot (present) for Respondent

Mr. Bibu - Court Clerk