



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 3 OF 2014**

*(From the original Conviction and Sentence in the Criminal Case No. 644/2010 of the Senior Resident Magistrate's Court at Wundanyi: I. K. Orenge – RM)*

**PROSPER MWAGHANIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The accused **PROSPER MWAGHANIA** was arraigned before the Resident Magistrate sitting at Wundanyi Law Courts on a charge of **DEFILEMENT OF A GIRL CONTRARY TO SECTION 8(1) (3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**. The particulars of the charge were that

**“On the 10<sup>th</sup> day of October, 2010 at about 4.00 p.m. at [Particulars withheld] village Kidaya Ngerenyi sub-location in Taita Taveta County had unlawful carnal knowledge of C S a girl of the age of 13 years.”**

The appellant also faced an alternative charge of **INDECENT ASSAULT ON A FEMALE CONTRARY TO SECTION 1(3) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006**.

The appellant entered a plea of ‘*Not Guilty*’ to both charges and his trial commenced on 20<sup>th</sup> June, 2011. The prosecution led by **CHIEF INSPECTOR OMBOGO** called a total of six (6) witnesses in support of their case. At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied the offences. On 15<sup>th</sup> April, 2014 the learned trial magistrate delivered his judgment in which he convicted the appellant on the main charge of defilement and thereafter sentenced him to serve twenty (20) years imprisonment. Being aggrieved the appellant filed this present appeal. **MR. MWAWASI** Advocate argued the appeal on behalf of the appellant. **MR. GIOCHE** learned state counsel acted for the state.

I have carefully perused the proceedings of the trial. Without even going into the merits of the appeal vis-à-vis the evidence adduced, I note with concern that several omissions and irregularities occurred during the course of the trial. Firstly and most importantly the charge upon which the trial was based was defective. The charge reads “*Defilement contrary to section 8(1)(3) of the Sexual Offences Act.*” No such provision exists in law. The charge ought to have read “*Defilement of a girl contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act.*” [my own emphasis] Neither the magistrate nor the prosecutor noticed this error and no application was made to amend the charges.

The complainant was a minor and was a child of tender years i.e. below the age of 14 years. The trial magistrate failed to conduct a '*voire dire*' examination to enable him determine whether the child understood the nature of an oath or not. This is a legal requirement under The Oaths and Statutory Declarations Act. The trial magistrate simply proceeded to have the child sworn in to begin her testimony.

Initially the trial proceeded in the absence of defence counsel and the appellant who himself was aged 17 years and was therefore also a minor, was called upon to cross-examine the witnesses on his own. On 13<sup>th</sup> July, 2011 one **MR. JUMA** Advocate appeared in court and indicated that he was acting for the appellant. He applied to have the trial begin *de novo* or at least to have the two witnesses who had already testified recalled for his cross-examination. On 26<sup>th</sup> July, 2011 the trial magistrate ruled that **PW1** and **PW2** be recalled for cross-examination by defence counsel. This was never done. Neither **PW1** nor **PW2** were ever recalled. Thus the trial court proceeded to convict the minor on evidence which had in effect been untested through cross-examination by the legal representative of the appellant. This action was gravely prejudicial to the appellant's rights to a fair trial. The court itself had in its ruling recognized the fact that the appellant as a minor was entitled to legal counsel. No reason was given as to why these two witnesses were not recalled as directed by the court.

Further on 14<sup>th</sup> September, 2011 the defence counsel applied that the trial magistrate disqualify himself from further conducting the trial. The magistrate indicated that he would deliver a ruling on this request on 20<sup>th</sup> September, 2011. No such ruling was ever delivered and the application for disqualification remained in abeyance. Instead on 8<sup>th</sup> May, 2011 the hearing proceeded with the evidence of the 5<sup>th</sup> witness.

Based on all the above anomalies/irregularities none of which can be blamed on the appellant, I find that the trial was not conducted in a fair and/or procedural manner. As such the eventual conviction cannot stand the test. I am mindful of the serious nature of the charge and the fact that the victim was also a minor. In the interests of justice I do direct that a re-trial be conducted at the Wundanyi Law Courts before a different magistrate. It is so ordered.

**Dated and signed this 25<sup>th</sup> day of June, 2014.**

**MAUREEN A. ODERO**

**JUDGE**

**Read and delivered in Voi High Court this 1<sup>st</sup> day of July, 2014.**

**MARTIN M. MUYA**

**JUDGE**