**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO.70 OF 2012**

**JOSEPH KIPKOECH BOYON.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against the Conviction and Sentence by the Resident Magistrate N. Baraza at Sotik in Sexual Offences No.44 of 2012 on 12.10.2012)*

**J U D G M E N T**

1. **JOSEPH KIPKOECH BOYON,** the appellant was charged and convicted of the offence of Defilement contrary to **Section 8(1) & (2)** of the **Sexual Offences Act No.3 of 2006**. The particulars being that the appellant on the 14th day of July 2012 at Kaptapsiri Village in Sotik District within Bomet County intentionally caused his penis to penetrate the anus of **DANIEL KIPRONO** a child aged eight years. Upon conviction he was sentenced to life imprisonment.

*2.* He was aggrieved by the Judgment and has appealed against both conviction and sentence raising the following grounds:

*i. That the learned trial Magistrate erred in law and facts in convicting the appellant to serve a sentence that contravenes Article 24 of the current constitution.*

*ii. That he erred in law and facts in convicting in reliance of a defective and duplex charge sheet.*

*iii. That he erred in law and facts in not finding that the prosecution case was purely circumstantial in nature.*

*iv. That he he erred in law and facts in not finding that the alleged identification at the locus in quo was not conclusive as it was made in haste and unexplained circumstances.*

*v. That he erred in law and facts in not finding that PW2 adduced only hearsay evidence from an unavailed witness which evidence was never even corroborated by the complainant herein.*

vi. *That he erred in law and facts in not finding that my arrest had no nexus with the incidence or the allegedly uninhabited house.*

3. Brief facts of the prosecution case were that PW2 who is the mother of the minor (PW1)

was unwell on 13th July 2012. She sent him to his aunt for some financial assistance for purposes of treatment. By 9.00pm the boy had not returned. She checked at a neighbour's to no avail.

4. It was the evidence of PW3 **PC Walubengo** that on 14th July 2012 at 2.00am they heard a child in some uninhabited house. On checking through the wire mesh window with a lit fire they saw the appellant whom they knew well, defiling the child. He had locked the door. He threw stones and fire at them. When he released the boy one officer held him. The appellant disappeared into the bush. The boy was taken for treatment at Kapkatet Hospital.

5. Medical evidence by PW5 **Elijah Langat** a clinical officer confirmed that the boy had been sexually assaulted through the anus. Nothing abnormal was found upon the examination of the appellant by PW5.

6. When the appellant was placed on his defence he elected to give a sworn defence and called no witness. He denied the charge, and referred to the medical exam and what the doctor said.

7. When the appeal came before me for hearing the appellant presented the court with written submissions, based on his amended grounds of appeal, which were a complete deviation from the earlier filed grounds of appeal.

8. Mr. Mutai the learned State Counsel did not oppose the appeal. He took issue with the way the trial court treated the evidence of PW1 the minor, after he was declared a vulnerable witness. That the court appeared to use his mother (PW2) as an intermediary yet the procedure for doing so had not been followed as envisaged in **Section 31(7)** of the **Sexual Offences Act**.

9. He further submitted that PW2's evidence was her own evidence and not that of PW1. That the evidence of PW3 an alleged eye witness was wanting as he did not explain how he knew the appellant, who was not arrested at the scene.

*10.* This being a first appeal this court has a duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusions. This was the holding in the case of **MWANGI V R (2004) 2 KLR 28** where the Court of Appeal held thus:

> *i. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.*
>
> *ii. The first appellate court must itself weight the conflicting evidence and draw its own conclusions.*
>
> iii. *It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its won findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.*

11. I have accordingly re-evaluated the evidence on record. I have equally considered the grounds of appeal, the submissions by the appellant and the learned Senior counsel.

12. The appellant in grounds 1 and 2 has raised an issue about his fundamental rights and a defective charge sheet. He was sentenced to life imprisonment as provided for under **Section 8 (2)** of the **Sexual Offences Act** under which he was charged. **Article 24** of the **Constitution**

allows for limitation of fundamental rights if such limitation is within the Law. In this case the sentence of life imprisonment is within the Law as the child's age fell within the age brackets provided. There was no defect in the charge sheet. He was charged under **Section 8(1**) as read with **Section 8(2)** of the **Sexual Offences Act**. He well understood what offence he was facing and the mere omission of the words *"as read with"* did not alter anything nor place him in any situation that was unconstitutional. I therefore disallow grounds 1 & 2 of his amended grounds of appeal.

13. I will deal with the rest of the grounds together which brings me to the question as to whether there was sufficient evidence for the conviction of the appellant.

14. From the record it is clear that PW1 (the victim) in this case did not testify. The court did not even conduct a *voire dire* exam of the witness. All that happened was that on the 1st day of hearing the prosecution applied for an adjournment because the minor was unable to speak. On the 2nd hearing date the prosecution applied that the witness be declared a vulnerable witness as he was a child of ten years. And that he was unable to give evidence on his own as he was in fear. He wanted the witness (PW2) to be appointed to give evidence on his behalf. The request by the prosecution was granted and the matter ended there.

15. **Section 31 (4)** of the **Sexual Offences Act** gives guidance on what should be done once a witness has been declared a vulnerable witness. This process was not adhered to in this case. For instance, besides saying the witness was unable to speak the court did not move further to find out why the witness was not able to speak. It was important to find out this as the witness had been speaking as is shown by the record.

16. The court did not appoint any intermediary for the witness under **Section 31 (3)** of the **Sexual Offences Act**. The mother (PW2) was not a witness to this incident. She gave her own evidence and not evidence on behalf of the victim (PW1). Failure to follow the correct procedure completely locked out the evidence of the complainant and placed the appellant in an awkward position. It amounted to a miscarriage of justice.

17. PW3's evidence appeared to place the appellant at the *locus quo.* The time of the alleged finding was 2.00am. He says they were able to see the appellant through wire mesh. They did not arrest him that night. It is not clear how the appellant was arrested. Obviously its not PW3 who arrested him. PW4 found him in the cells and took him to hospital for tests on 16/7/2012. So who arrested him and who identified him for the arrest?

18. PW3 alleges that the appellant threw stones and fire at them. How was this when he could not allow them in the house? One would have expected PW3 to liase with the station via modern technology (e.g mobile phone) for reinforcement if there was such need.

19. I am not satisfied with the identification of the appellant.

**20.** With all the loopholes pointed out above,I find the conviction to be unsafe. The State has rightly conceded the appeal. I therefore allow the appeal, quash the conviction and set aside the sentence. The appellant to be released unless otherwise lawfully held under a separate warrant.

**Dated, signed and delivered in open court this 11th day of November, 2014**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of:**

Miss. Kivali for State

Appellant Present in Person

Rotich- Court Assistant