GEOFFREY AGESA.....APPELLANT

AND
REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of A.B. Mong'are Senior Resident Magistrate at Eldoret Chief Magistrate's Court

in Criminal Case Number 2997 of 2007 dated and delivered on 1st July, 2009)

JUDGMENT

The appellant, **Geoffrey Agesa,** was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. It was alleged that the appellant, on 9th March, 2007 , at [particulars withheld] Farm in Uasin Gishu District, within the Rift Valley Province, committed defilement with **JC** (hereinafter "the complainant") a girl aged 16 years.

The appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that the appellant on the same date and at the same place committed an indecent act by touching the private parts of the complainant.

The appellant was tried before **A.B. Mong'are** (SRM) who after considering the evidence presented by the prosecution found the appellant guilty of the principal charge of defilement. After, regarding the appellant's mitigation, she sentenced him to fifteen (15) years imprisonment.

The appellant was dissatisfied and has appealed to this court against both conviction and sentence on the grounds that his fair trial rights under the constitution were violated; that he was convicted on hearsay evidence and that the medical evidence did not support the charge.

When the appeal came up before me for hearing, **Mr. Chirchir** Learned Senior State Counsel who represented the state, conceded the appeal on the grounds that essential witnesses were not called to testify; that the medical evidence did not support the charge and that the defence was misconstrued.

Having considered the record and the submissions of counsel, I agree with the Learned Senior State Counsel that the medical evidence did not support the charge. The same was adduced by **Joseph Chesanai** (PW5) a Senior Medical Officer then stationed at Uasin Gishu District Hospital. He concluded his testimony as follows:

"P3 form was signed by me on 11th March, 2009, the patient was seen by me.

(P3 form produced as exhibit (a – e)
Genitalia – I did not examine the same as it was too late to examine."

So, the medical testimony did not indeed support the charge.

Having re-evaluated, and re-analysed the evidence, which was adduced before the Learned Senior

Resident Magistrate, I also note that the appellant denied the charge. In his own words:

"The officer who arrested me interviewed the girl. She confirmed she came on her own to visit me. She came and lied I identified (sic) her. I did not defile her"

The appellant therefore clearly denied the charge. Yet the Learned Senior Resident Magistrate did not find that statement a denial of the charge. In her own words:

"The accused person says complainant went to visit him and the wife on her own. He however does not deny committing the offence."

That finding is significant in two respects. Firstly the finding was made even before the Learned Senior Resident Magistrate commenced her determination of whether the prosecution had proved their case as required in law. So, before consideration of the testimony of the prosecution, the Learned Senior Resident Magistrate had clearly concluded that the appellant had not denied committing the offence. The Learned Magistrate therefore predetermined the guilt of the appellant even before considering the prosecution evidence. That was in my view a grave misdirection given that the appellant had not in fact unequivocally admitted committing the offence.

The Learned Senior Resident Magistrate also purported to apply the proviso to section 124 of the Evidence Act. She determined that the complainant was truthful. Yet, on her own admission, she was arrested and taken to Langas Police Station. The arrest was confirmed by **HK**(PW2), the complainant's mother. **JK** (PW3), the complainants' father, also confirmed that arrest. The father also testified that he had received information that the complainant had run away from home and he had to obtain police assistance to get her.

The complainant was in the premises not treated as an innocent victim even by her own parents. She had indeed even lied to them about her whereabouts. In my judgment, the complainant's testimony should not have been safely accepted under the proviso to section 124 of the Evidence Act as it was discredited.

I am not therefore surprised that the Learned Senior State Counsel conceded the appeal. I agree that the appellant was not convicted on sound evidence. I allow the appellant's appeal and quash his conviction by the Learned Senior Resident Magistrate. Without conviction, the sentence has no basis and cannot stand. The same is hereby set aside. The appellant is set free forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF JULY, 2012

F. AZANGALALA
JUDGE

Read in the presence of:-

The Appellant and
Mr. Chirchir for the State

F. AZANGALALA
JUDGE
5TH JULY, 2012