



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A.)**

**CRIMINAL APPEAL NO. 357 OF 2011**

**BETWEEN**

**N M A Alias M W.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An Appeal from a Judgment of the High Court of Kenya at Bungoma,*

*(Muchemi, J.) dated 26<sup>th</sup> July, 2011*

**in**

**H.C.C.R.A. NO. 66 OF 2009)**

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**JUDGMENT OF THE COURT**

1. **N M A** alias **M W** (the appellant) was upon trial for the offence of defilement contrary to **Section 8(2)** of the Sexual Offences Act convicted and sentenced to life imprisonment. This is a second appeal against that conviction and sentence, the appellant's first appeal having been dismissed by the High Court.
2. The brief facts of the case were that the appellant is a step-brother of the complainant. At the material time the complainant was eight (8) years old. On the material date the complainant went with her elder sister, PW2, to the family farm to harvest potatoes. Shortly thereafter the appellant joined them and offered to assist the complainant to harvest potatoes and persuaded PW2 to go back home and attend to other household chores. After PW2 had gone away, the appellant took the complainant to his house and defiled her. When the complainant delayed in returning home, PW2 went out looking for her and found her with the appellant in the appellant's house. She was lying on the appellant's bed with her legs apart and profusely bleeding from her vagina. PW2 had to carry her as she was unable to walk. Later PW2 informed their father, PW3, of the incident. PW3 reported the matter to police.
3. The appellant was thereafter arrested, charged with the offence of defilement and, as stated, after trial, he was convicted and sentenced to life imprisonment. His appeal to the High Court was dismissed thus provoking this second appeal.

4. In his appeal premised on five grounds, the appellant faulted the learned Judge of the High Court for failing to appreciate: that the appellant's rights to a fair trial were flouted; that the charge preferred against the appellant was defective; that the sentence imposed upon the appellant was harsh and excessive; and that the learned Judge failed to properly re-evaluate the evidence on record.

5. In his written submissions, the appellant, while appreciating the import of **Section 361** of the Criminal Procedure Code, raised several points of law. They are that contrary to **Article 50 (4)** of the Constitution and **Section 47** of the Evidence Act, the evidence founding his conviction was obtained by fraud and collusion in that PW1, PW2 and PW3 who are all from the same family, colluded to frame him; that the trial magistrate's judgment was a nullity as **Section 169(1)** of the CPC was not complied with; that PW1 who claimed she was continually bleeding and yet she was not taken to hospital until 18<sup>th</sup> February 2008 was obviously a liar whose evidence should not have been accepted under **Section 124** of the Evidence Act; that both the two courts below erred in failing to draw an adverse inference from the prosecution's failure to call, as witnesses, the area Chief who directed that the complainant be taken to hospital and that of P.C Cheptot who investigated the case; and that despite his protestations and contrary to **Article 50 2(j) & (k)** of the Constitution, he was not given witness statements thus infringing on his right to a fair trial.

6. In conclusion, the appellant argued that had the learned Judge of the High Court properly re-evaluated the evidence on record, she have would noted these flaws and allowed his appeal.

7. In response, Ms Oduor, learned Senior Prosecution Counsel, dismissed the appellant's contention that the charge was defective and that the trial court misapprehended the law. She said the charge was brought under the correct section and the sentence imposed on the appellant was legal. She also dismissed the appellant's contention that he was not given enough time to prepare his defence case. She said after the close of the prosecution case, the appellant said he was ready to tender his defence which he did. In conclusion, she submitted that the appellant's conviction was based on overwhelming evidence and urged us to dismiss this appeal.

8. We have carefully perused the record of this appeal and considered the appellant's written submissions as well as those of the learned Senior Prosecution Counsel.

9. The child victim in this appeal was 7 years old. The charge brought against the appellant under **Section 8(2)** of the Sexual Offences Act was therefore not in any way defective as the appellant alleged. Regarding the appellant's claim that contrary to **Article 50 2 (j) & (k)** of the Constitution he was not accorded a fair trial, it is true that the appellant applied for witness statements and the same were not supplied to him. That notwithstanding, however, he cross-examined all the prosecution witnesses and after the prosecution closed its case, he did not apply for adjournment. Instead he said he was ready and proceeded to tender his defence. In the circumstances we do not think that failure to supply him with witness statements prejudiced him in any way. That ground therefore fails.

10. The appellant also claimed that **Section 169(1)** of the Criminal Procedure Code was not complied with. That section requires judgments to be written by or under the direction of Judicial Officers in the cases they preside over. It also requires every judgment to contain "*the point or points for determination, the decision thereon and the reasons for the decision...*" The appellant did not specify the aspect of the trial court's judgment he thought did not comply with this provision. Having examined it ourselves, we see no fault with it. We therefore also dismiss that ground of appeal.

11. The last ground of appeal faulted the learned Judge of the High Court for having failed to properly re-evaluate the evidence on record. Having read the High Court judgment, we find that the learned Judge carefully and thoroughly re-evaluated the prosecution evidence which left hollow the appellant's claim that the defilement was trumped up against him by PW3 who had a land dispute with him. On the evidence on record, both the two courts below found, quite correctly in our view, that there was no land dispute between the appellant and PW3.

12. The trial court found the complainant to be a candid and straightforward child and accepted her

evidence. Under **Section 124** of the Evidence Act, that was sufficient evidence upon which the appellant could be convicted without any corroboration. In this case, however, the evidence of PW2 and that of the clinical officer, PW4, amply corroborated the complainant's. The appellant's complaint therefore that the court erred in basing his conviction upon the complainant's uncorroborated evidence also fails.

13. In the upshot, having ourselves carefully re-evaluated the entire evidence on record, we are also satisfied that the appellant's conviction was founded on overwhelming evidence and the life imprisonment imposed upon the appellant is legal. In the circumstances, we find no merit in this appeal and we accordingly dismiss it in its entirety.

**DATED and delivered at Eldoret this 17<sup>th</sup> day of February, 2016.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy  
of the original.

**DEPUTY REGISTRAR**