**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, G.B.M KARIUKI & GATEMBU, JJ.A)**

**CRIMINAL APPEAL NO. 110 OF 2013**

**WESLEY KIPRONO MUTAI..... APPELLANT**

**VERSUS**

**REPUBLIC …..... RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Nairobi (Achode, J) dated the 11th day of October 2012*

in

**HC. CR.A 484 of 2010***)*

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**JUDGMENT OF THE COURT**

1. The appellant, Wesley Kiprono Mutai was charged with the offence of defilement of a girl under section 8(1) and (2) of the Sexual Offences Act.

The particulars were that on 15th April 2008 at Mathare North area in Kasarani Division, Nairobi he defiled JM a girl aged 5 years. He was also charged with two additional counts of sexual assault contrary to section 5(1) as read with section 5(2) of the Sexual Offences Act. There was also an alternative charge of indecent act with a child contrary to section 11 of the Sexual Offences Act. After a trial conducted before the magistrate's court at Makadara, Nairobi the appellant was convicted for the offence of defilement of a girl under section 8(1) and (2) of the Sexual Offences Act and sentenced to serve a life imprisonment.

2. The appellant appealed against the conviction and sentence to the High Court on grounds that; *the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006 was not proved against him; the case against him was fabricated; enough doubt had been raised to secure his release; and that the learned trial magistrate ignored his defence contrary to section 212 of the Criminal Procedure Code Cap 75 Laws of Kenya.*

3. In its judgement delivered on 11th October 2012 the High Court (L. A. Achode, J) concluded that "*the evidence on record was sufficient to sustain a conviction for the charge of attempted defilement*" and that "*the offence of attempted defilement carries a sentence of not less than 10 years upon conviction*" and that "*the appeal is meritorious only to that extent*."

4. Dissatisfied, the appellant has in this second appeal to this Court complained that the High Court erred in upholding the conviction because the prosecution's case was riddled with contradictions, inconsistencies and shortcomings and that the offence was not proved beyond a reasonable doubt; the holding by the High Court that the minor's evidence was corroborated was erroneous; the High Court did not discharge its duty to evaluate and analyse the evidence and erred in finding that the evidence was sufficient to sustain a conviction for attempted defilement and that the High Court should have held that the appellant's rights were violated as he was presented to court five days after his arrest when he should have been presented to court within 24 hours as required by law.

**Background**

5. The facts as they emerge from the evidence presented before the trial court are that JM and the appellant were neighbours and that on 15th April 2008 at about 6:30 p.m. the appellant enticed JM together with three of her friends to his house and bought them sodas. According to JM who testified as PW 1 the appellant thereafter chased away JM's three friends from his house leaving JM alone with the appellant in the house. The appellant then lifted JM onto a bed, switched off the lights, removed his clothes, undressed JM and then defiled her inserting his finger, tongue and penis inside her vagina.

6. JM's mother, PW 2 was in her house on 15th April 2008 at about 6:30 p.m. when a child delivered JM's shoes saying that he found them outside the gate. PW 2 decided to look for her daughter. After making enquiries with her neighbours, she was directed to the second floor of *" Mama [particulars withheld] house" where she was informed by [particulars withheld] that "a man who stays downstairs had bought them[children] soda and then the man had remained with… [JM]…and closed the door."* That led PW 2 to the appellant's house. Upon knocking on the door to the appellant's house whilst at the same time calling out her daughter's name, nobody opened the door and neither did her daughter respond to the calls. She managed to put her hand through a space on the door, unbolted it and entered the appellant's house and upon entering she encountered darkness. On calling out her daughter's name, there was again no response. She heard muffled sounds and proceeded in the direction from where the sounds came from, lifted a curtain that partitioned the room and found the appellant naked on top of her daughter, JM. Her daughter was also naked below the waist. PW 2 screamed and asked the appellant to release her daughter and then pulled JM away from the appellant. PW2 continued screaming to alert neighbours. The appellant then pushed both PW2 and JM out of the house and locked himself inside. PW2 did not know the appellant prior to the incident and established his name at the Police Station.

7. Z O (PW6) is one of the people who responded to the screams by PW2. She covered JM with a 'Kikoi' and together with F K Ki (PW5) they proceeded to Muthaiga Police Station alongside JM where they reported the incident and thereafter went to Nairobi Women's Hospital for treatment. Both PW5 and PW6 observed whitish substance as well as scratch marks on JM's thighs.

8. P.C John Mwiti (PW3) who was based at Muthaiga Police Station at the time received a report at about 9:00 p.m. on 15th April 2008 from PW2, PW5 and PW6 that a neighbour had defiled JM. Together with Corporal Mutundu (PW8) they accompanied PW2, PW5 and PW6 to the scene of crime. On introducing themselves to the appellant he opened the door to his house. On searching the appellant's house, PW3 found clothing, namely a biker and small bluish pant of trousers that was identified as belonging to JM. The appellant, who appeared to be drunk, was arrested and charged.

9. Dr. Adan Ridhanam (PW7) a medical doctor at Nairobi Women's Hospital produced a medical report prepared on 15th April 2008 by a colleague Dr. Muhombe who examined JM on that date. Based on that report, JM was bleeding from her private parts when she was examined; her hymen was intact; there were no tears; bacterial infections were identified and the finding by Dr. Muhombe was that there was defilement.

10. Dr. Zephaniah Kamau (PW4) examined JM on 18th April 2008 with a history of treatment at Nairobi Women's Hospital. He found scratches on her left thigh. Her genitalia was normal. There was no indication of injury to the vulva pineal of the vagina. There were no signs of genital infection and there

was no discharge. The hymen was intact.

11. C.I Catherine Ringera (PW9) the OCS of Muthaiga Police Station who carried out investigations in connection with the matter explained that the appellant was arrested on 15th April 2008 but was not arraigned in court until 21st April 2008 on account of the incident falling on a weekend and that she swore an affidavit giving the reasons for delay which was not intentional. She stated that the appellant had filed an application in the High Court complaining about the delay in his arraignment after his arrest and that the appellant later withdrew that application.

12.In his defence the appellant stated that on 15th April 2008 at about 5.00 p.m. he passed by PW2's shop; had a brief chat with PW2 before proceeding to his house; on his way to his house he encountered children, including JM, playing; they followed him to his house; they stayed in the house together and he bought them sodas after which they left; between 7:30 pm and 8:00 pm he heard PW2 screaming inside his house claiming that he had defiled her child; that PW 2 then left his house and between 9:00 pm and 9:30 pm two police officers accompanied by two ladies came to his house; a search was conducted inside his house; he observed that PW6 who was present was carrying a black polythene bag which she took to his bedroom and returned with it claiming that she recovered a pair of bikers and a pantie when in fact those items were already in the polythene bag; he was thereafter escorted to Muthaiga Police Station where he stayed until Monday 21st April 2008 when he was arraigned in court.

13.The trial court was satisfied that the prosecution had proved the case beyond any reasonable doubt; the evidence of JM was corroborated by that of her mother PW 2; the appellant was caught red handed in the act and that the appellant "*hardly challenged the evidence introduced by the prosecution from start to finish*" and convicted him for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The appellant was sentenced to serve life imprisonment. Against that background, the appellant has lodged the present appeal.

**Submissions by Counsel**

14.As we have already mentioned, the appellant's complaints before this Court are that the learned judge erred in law in upholding the conviction of the appellant without observing that the prosecution's case was inconsistent and contradictory; the learned Judge erred in law in holding that there was corroboration of JM's evidence that the learned judge erred in law in failing to re-evaluate and analyse evidence on record as is expected in law; the learned judge erred in law in finding that the evidence on record was sufficient to sustain a conviction; and that the learned judge erred in law in failing to find that the appellant's rights were violated because he was presented to court 5 days after his arrest, a period longer than the mandatory 24 hours required by law.

15.During the hearing of the appeal before us, the parties were represented by learned counsel. Mr. Alfred Ongoto represented the appellant whereas Ms. Jacinta Nyamosi Senior Assistant Deputy Public Prosecutor represented the respondent. Mr. Ongoto submitted that the High Court abdicated its duty to re-evaluate the evidence and draw its own conclusions with the result that conflicting and inconclusive evidence was relied upon; that the 'whitish substance' allegedly seen by PW5 and PW6 on JM's thigh should have been subjected to examination to determine what it was; there was evidence that JM had been coached by her mother on the testimony to give to the court; on the strength of the case of **Joseph Karanja Mungai v R NBI Cr. App No. 157 of 2003** the trial court ought to have examined JM prior to her testimony to ascertain whether she understood the nature of an oath and whether she appreciated the importance of speaking the truth.

16.According to Mr. Ongoto the evidence of PW3 and PW8 in relation to the arrest of the appellant was contradictory; that the High Court merely endorsed the trial court's decision without analysing the evidence and drawing its own conclusion. Mr. Ongoto also referred us to the Court of Appeal decision of **Lukas Okinyi Soki v R Ksm Cr. App No. 26 of 2004** and submitted that the High Court did not state whether or not it agreed or disagreed with any limb of the evidence and assumed that there was evidence on the substituted charge of attempted defilement. With that, counsel urged us to allow the appeal and set aside the conviction.

17.Opposing the appeal, Ms. Nyamosi for the respondent submitted that the High Court discharged its duty on a first appeal to re-evaluate and analyse the evidence on the basis of which it concluded that the evidence presented by the prosecution was sufficient to sustain the conviction; the evidence of JM was corroborated by that of PW2 and PW6; in any event, under section 124 of the Evidence Act the evidence of JM did not require corroboration; the offence of defilement was proved considering that PW2 found the appellant in the act even though penetration may have been partial. According to counsel the High Court did not in fact substitute the charge of defilement with that of attempted defilement despite the sentiments expressed by the learned Judge of the High Court and the conviction by the trial court should be upheld.

**Determination**

18. This being a second appeal, our duty in accordance with Section 361 of the Criminal Procedure Code, Cap 75 Laws of Kenya is to consider points of law only. As this Court stated in the often-cited case of **Chemagong -vs.-Republic (1984) KLR 213** at page 219:

***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja- vs.-Republic 17 EACA 146)."***

19. The issues that arise for our consideration in this appeal are whether the High Court as the first appellate court discharged its duty to re-evaluate and analyze the evidence and to draw its own conclusions. The second issue is whether the evidence of JM required corroboration and whether the prosecution proved the case beyond a reasonable doubt. The third issue is whether the appellant's constitutional right to be charged within the period stipulated was violated and if so the effect of such violation to the entire prosecution and ultimately this appeal.

20.On the first issue, it is common course, in keeping with the holding of this Court in **Okeno v R [1972] E A 32,** that it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. Indeed as this Court stated in **Gabriel Kamau Njoroge v R (1982-88) 1 KAR 134** cited with approval in **Lukas Okinyi Soki v R (supra)** to which counsel referred:

***"Parties are entitled to demand of the first court of appeal a decision on both questions of fact and law, and the court is required to weigh conflicting evidence and draw its own inference."***

21. We have reviewed the judgment of the High Court and are satisfied that the learned Judge did discharge that duty. After reviewing and evaluating the evidence, the learned Judge of the High Court concluded:

***"In my analysis of the evidence on record, I find that the trial Court should have convicted the appellant for the offence of attempted defilement contrary to Section 9(1) and (2) of the Sexual Offences Act. The said section provides as follows:***

***9.1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***

***9.2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.***

***I have re-appraised and re- evaluated the evidence on record in its entirety and find that the evidence on record was sufficient to sustain a conviction for the charge of attempted defilement.***

***The offence of attempted defilement carries a sentence of not less than 10 years upon conviction. For the foregoing reasons, I find that the appeal is meritorious only to that extent."***

22.In coming to that conclusion, the learned Judge clearly dissected the evidence and applied her mind to the evidence on record in order to reach the conclusion that she did. The fact that the conclusion reached by the Judge was not the conclusion the appellant would have desired does not at all negate the fact that the High Court discharged its duty. There is however the question whether the learned Judge did in fact interfere with the decision of the trial court having come to that conclusion. We will return to that question later.

23. The next issue is whether the evidence of JM required corroboration and whether the prosecution proved its case to the required standard. In this regard, the learned Judge stated,

***"Under section 124 of the Evidence Act, the evidence of a victim of a sexual offence does not require corroboration. However, in this case there was corroboration from PW2, the Complainant's mother…"***

24. We are fully in agreement with the High Court in that regard. Section 124 of the Evidence Act provides:

***"...Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

25. The trial court was satisfied that JM was a witness of truth. The learned trial magistrate stated in his judgment that:

***"The child gave her testimony. It was tested and remained unshaken on cross-examination. It was intact. It was confirmed by the child's mother. It was corroborated further by Zipporah the police officer who was first to enter the house, personally recovered clothes or items of clothing's belonging to the child in the house of the accused."***

26. With those concurrent findings by the lower courts, there is no basis for us to interfere for we can only interfere with concurrent findings of fact when there is no evidence to support such findings or where the evidence is so unreasonable that no tribunal could have come to the conclusions made.

**See Chemagong v R [1984] KLR 611 and Kiango v *R* (1982) KLR 213.**

In this case there is no basis for us to interfere. The evidence of JM was corroborated by the testimony of PW2, her mother, who walked in on the appellant when he was on top of her child 'with his pants down.' The evidence of PW2 was corroborated by PW5 and PW6 who saw the child naked below the waist, with scratches on her thighs and who escorted JM and PW2 to the police station to record a statement as well as to hospital to seek treatment for JM. The medical reports produced also supports the testimony given by PW5 and PW6. Though corroboration is not required under Section 124 of the Evidence Act there was in this case corroboration of J.M's evidence nevertheless.

27. The next issue is whether the appellant's constitutional right to be charged within the period stipulated was violated and if so the effect. The appellant argued that his constitutional rights were violated because having been arrested on 15th April 2008 he was not arraigned in court until 21st April 2008. That cannot, on the strength of the decision of this Court in **Julius Kamau Mbugua v R Criminal Appeal No. 50 of 2008** be a basis for an acquittal. In that case the Court stated:

***"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in section 72(b). That is the appropriate remedy which the appellant should have sought in a different forum."***

28. It is our view that the right of the appellant after arrest was to be arraigned within 24 hours and tried

within a reasonable time. It was not to be arraigned or tried if the deadline of 24 hours was not overcome.

29. The other matter which we should consider is the contention that JM was not examined by the trial court prior to her testimony to assess whether she appreciated the essence of an oath or the need to speak the truth. That argument is however not borne out by the record that shows that the trial magistrate did in fact examine JM before directing that her testimony would be unsworn statement. The trial court satisfied itself that JM "*appears not mature enough to understand the nature of an oath and also consequences of giving a statement on oath*." The appellant's complaint in that regard is therefore baseless.

30. Finally, there is the matter relating to the remarks made by the learned Judge of the High Court that the evidence pointed to the lesser charge of attempted defilement. Counsel for the appellant was not certain whether the learned Judge of the High Court did in fact alter the finding on the conviction to that of attempted defilement. Counsel for the respondent on the other hand took the view that despite the remarks by the learned Judge, no substitution was in fact done and the conviction by the trial court stands.

31. Under section 354(3) of the Criminal Procedure Code, the High Court has the power in an appeal from a conviction to reverse the finding and sentence and acquit or discharge the accused. It also has the power to alter the finding, maintaining the sentence or with or without altering the finding, reduce or increase the sentence. It may also, with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence. In exercising such power, the High Court must be unequivocal and not leave it to speculation

32. In this case the learned Judge of the High Court stated that "*the trial court should have convicted the appellant for the offence of attempted defilement contrary to section 9(1) and (2) of the Sexual Offences Act...*" and that "*the evidence on record is sufficient to sustain a conviction for the charge of attempted defilement ……*" and further that "*the offence of attempted defilement carrying a sentence of not less than 10 years upon conviction...*" and that "*the appeal is meritorious only to that extent*." With respect to the learned judge, those statements are unequivocal. If the learned judge intended to alter the finding on the conviction and to reduce the sentence, she should have done so in express terms.

33. Furthermore, even if we were to construe the judgment of the High Court as altering the finding on the conviction and on the sentence, we consider that to be a wrong decision on a question of law under section 361(2) of the Criminal Procedure Act to the extent that it would appear to be based on a misapprehension of the evidence and when the evidence of defilement was overwhelming. The circumstances in this case can be contrasted with those in the case of **Shimayamana Jeane Claude v R Criminal App No. 67 of 2006 [2008] eKLR** where the trial magistrate found the appellant guilty of defilement. On appeal to the High Court, the learned Judge found that the evidence adduced proved attempted defilement rather than defilement. On a second appeal from that decision, the Court of Appeal, found no basis for interfering with the findings of fact and law arrived at by the two courts below, and determined that the sentence imposed on the appellant was lawful.

34. For all the above reasons, the appeal fails and it is dismissed in its entirety.

**Dated and delivered at Nairobi this 18th day of December, 2014.**

**R. N. NAMBUYE**

**……..**

**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

**……**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

**……..**

**JUDGE OF APPEAL**

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

***DEPUTY REGISTRAR***