REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT ELDORET
CRIMINAL APPEAL 123 OF 2009

HILLARY NYONGESA:……APPELLANT

VERSUS

REPUBLIC:……..RESPONDENT

JUDGMENT

The Appellant was convicted of the offence of defilement of a girl aged 15 years and was found guilty and sentenced to serve a term of imprisonment of 30 years. He has appealed against conviction as well as sentence. The grounds of Appeal are:-

1. **That the Learned Magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt in spite of the glaring lack of evidence.**
2. **That the learned magistrate erred in law and fact by dismissing the evidence tendered in defence by the Appellant.**
3. **That the learned trial magistrate erred in law and fact by failing to conclusively ascertain the actual age of the complainant.**
4. **That the learned trial magistrate erred in law and in fact in admitting in evidence documents that do not support the charge.**
5. **That the Learned trial magistrate erred in law by convicting the Appellant on the basis of a defective charge sheet.**
6. **That the learned magistrate erred infact by handling the Appellant a harsh sentence and ignoring the mitigation tendered by the Appellant.**

At the hearing of the application learned counsel for the Appellant submitted that the charge sheet was defective and the same was never amended. She said that section 8(1) (2) of the Sexual Offences Act does not exist. Further more the magistrate did not state on which offence the Appellant was convicted and sentenced for. Counsel added that the sentence of 30 years handed down to the Appellant is not provided for under section 11(1) or section 8(3) of the Sexual Offences Act. It was further submitted for the Appellant that the age of the complainant was never ascertained and hence it was unclear under what section of the Sexual Offences Act the Appellant was sentenced.

Learned state counsel Mr. Kabaka opposing the Appeal submitted that evidence adduced in court was cogent and the small error on the charge sheet, that of failing to state that Appellant was charged under section 8(1) and 8(2) of the Sexual Offences Act did not occasion a miscarriage of justice. His further submission was that the sentence of 30 years was proper as the law provided for a term of imprisonment of not less than twenty years for the offence committed. He was of the view that an accused who is found guilty must pay for his offence.

On my part I have thoroughly perused the evidence at trial and I find that nowhere in it was the age of the victim established. All there is as concerns age is the victims word for it. The victim also told the doctor examining her that she was 15 years old. In my considered view those two statements by the victim in the absence of a birth certificate or medical age assessment reports do not suffice. Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this

becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim. In this case the age of the victim was not proved and hence any sentence passed and meted out to the accused would be a matter of conjecture which would not stand in criminal cases where the offence must be proved beyond any reasonable doubt.

I have looked at the charge sheet. This is how it is drafted

"**CHARGE – Defilement in violation of Section 8(1) (2) as read with section 8(3) of the Sexual Offences Act no.3 of 2006**." The Appellant also faced an alternative which is framed in the charge sheet as "**ALTERNATIVE CHARGE: Indecent Act with a child contrary to section "(1) of the Sexual Offences Act No.3 of 2006**."

Section 8(1) of the Sexual Offences Act merely defines defilement. Section 8(2) relates to the offence of defiling a child aged eleven years or less and the punishment is imprisonment for life. The particulars of the offence state that the victim was 15 years. What then was the prosecution thinking framing the charge as they did. The victim's given age cannot simultaneously fall under sections 8(2) and 8(3) of the Sexual Offences Act. This framing of the charge by the prosecution and the failure by the trial court to note it and have it amended are fatal to the charge. The evidence led at trial was that of defilement and in my assessment of that judgment defilement did in fact occur as charged. There was however no evidence led on the alternative charge of indecent assault and so the prosecution case was incurably flawed and cannot be saved at this late stage. The trial magistrate also failed to state what provisions of the Sexual Offences Act he was convicting the accused under, whether on the main count or on the alternative one. That failure is another fatality.

I note, regretfully, that this a case that was so poorly prosecuted and conducted by the trial court that in its circumstances where defilement appears to have actually occurred, the Appellant must be released which is a great miscarriage of justice to the victim. Let it go to serve as a warning and a wake up call that both the prosecution and the trial court must be alert and meticulous in the execution of their mundane duty of ensuring that cases are handled with the seriousness and keenness that allows for justice to all the parties in the case, the victim as well as the accused, the number of cases the courts have to handle daily notwithstanding.

On the grounds and reasons given above in the assessment of the evidence at trial, this appeal must succeed. Accordingly I quash the conviction and set aside the sentence and set the Appellant at liberty forthwith unless he be for any lawful cause held.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF JUNE 2010.

P.M.MWILU
JUDGE

IN THE PRESENCE OF

Present in person - Appellant
Mr. B.I.Otieno H/B Robert Arunga -Advocate for Appellate
Chirchir - Counsel for the state
Andrew Omwenga - Court Clerk.

P.M.MWILU
JUDGE