CKG v Republic (Criminal Appeal E158 of 2023)
[2024] KEHC 16695 (KLR) (Crim) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16695 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E158 OF 2023

AM MUTETI, J

DECEMBER 20, 2024

BETWEEN

CKG ..... APPELLANT

AND

REPUBLIC ..... PROSECUTION

(Being an appeal against both the conviction and sentence in the Chief Magistrate's Court in Kibera SO. Case No. 84 of 2022 by the learned Honorable E. Riani S.R.M delivered on 25th April 2023 and 16th May 2023.)

JUDGMENT

Introduction

1. The Appellant herein was charged in the Chief Magistrate Court at Kibera Criminal SO. Case No. 84 of 2022 with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act* No. 3 of 2006.

   The particulars of the offence were that:

   > " The accused on the 29th day of August, 2022, at [Particulars Withheld] within Nairobi county, being a male person caused his penis to penetrate the anus of P.G.K a child aged 7 years old who was to his knowledge his son."

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.

The particulars of the offence were that:

> " The accused on the 29th day of August 2022, [Particulars Withheld] within Nairobi county, intentionally and unlawfully committed an indecent act by touching the genital organ (anus) of P.G.K a boy child aged 7 years old with his penis."

3. He pleaded not guilty to both charges. Thereafter, full trial ensued.

   On the main charge of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act* No. 3 of 2006, the trial court was not satisfied that the Prosecution had proved its case beyond reasonable doubt against the Appellant; and so, he was found not guilty and acquitted on the aforementioned count.

4. However, on the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006, the trial court held that Prosecution had proved its case against the Appellant beyond reasonable doubt thus the court convicted and sentenced him to ten (10) years' imprisonment.

5. The appellant being aggrieved by the decision of the learned Honorable Magistrate has appealed to this court on the following grounds:-

   a. That the trial magistrate erred in law and fact in finding that the prosecution had proved its case against the appellant beyond any reasonable doubt as regards the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whilst all through the trial, the prosecution was mono-focused on the main charge of defilement contrary to section 8(1) as read with section 8(2) of the *sexual offences act*; thus limiting the ambit of the trial to the main charge and not the alternative charge. This constituted a contravention of the appellant's fair trial rights as guaranteed by Article 50 of *the Constitution*, 2010.

   b. That the trial magistrate erred in law and fact by determining that the prosecution proved its case beyond any reasonable doubt against the appellant as regards the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, despite the prosecution's failure to prove the constituent element of penetration and/or indecent act beyond any reasonable doubt.

   c. That the trial magistrate erred in law and fact by not giving due weight to PW5's (expert witness) testimony wherein he testified that he treated PW2 for pneumonia and not sexual assault; the symptoms that PW2 exhibited were as a result of pneumonia and not sexual assault in the slightest.

   d. That the trial magistrate erred in law and fact by not giving due weight to PW1's (expert witness) testimony wherein he testified that no anal injury was noted, it was normal and there was no bleeding as would have been exhibited if the appellant had defiled the minor and/or committed an indecent act by inserting an object in the minor's anus.

   e. That the trial magistrate erred in law and fact by conflating PW2's viva voce testimony and his written statement which were contradictory; from his viva voce testimony, PW2 said that the appellant had not abused him in any sexual way whereas in his written statement - which with due respect is a projection of "adult" suppositions and hearsays - he alluded that the appellant had abused him sexually.

   f. That the trial magistrate erred in law and fact by ignoring the testimony elicited during cross examination of PW4, wherein she stated that she did not bother to confirm if the appellant

had locked his bedroom door but assumed that it was locked during the alleged offence, and concluding that the appellant had locked his door hence PW4 (the house help) could not get in to find out what problem the minor had.

g. That the trial magistrate erred in law and fact by failing to appreciate the appellant's defence with regards to PW4 coaching PW2 so as to implicate the appellant in a bid to settle adult scores; to which PMFI-7 Pexh 7, tendered by PW7 supports the appellant's defence.

h. That the trial magistrate erred in law and fact by making a finding that there was evidence of committing an indecent act as the minor clothes were removed and something inserted in his anus thrice by the appellant during which period he was crying uncontrollably up to 3:00 am and the bedroom door locked, contrariwise to the testimony of PW7 (investigation officer) who said that he did not recover the object used in the alleged offence. Besides, even the medical report showed that no bruises nor lacerations existed on the minor's anus; the same is confirmed by PW5 who examined the minor.

i. That the trial magistrate failed to act judiciously by failing to appreciate that, by convicting and sentencing the appellant on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, she was prosecuting the aforesaid alternative charge in lieu of the prosecution; in essence, the alternative charge was resorted to by the trial magistrate, without considering that the prosecution all through was mono-focused on the main charge, and that alone.

j. That the trial magistrate erred in law and fact by failing to appreciate the methodology used by DW2 in assessing and/or evaluating PW2's psychological condition, and the findings therein.

k. That the trial magistrate misdirected herself in fact and law in convicting the appellant while relying on her own conjectures, unproven hypotheses and arriving at wrong judgment.

6. The grounds raised by the appellant in summary raise the following issues for determination:-

i. Whether the prosecution proved all essential elements of the alternative charge (committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006) beyond a reasonable doubt?

ii) Whether there was sufficient evidence to support a conviction of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006, as alleged in the charge sheet?

iii) Whether in the circumstances of this case, the conviction of the appellant was safe in light of the evidence on record.

Duty Of The First Appellate Court

7. The High Court sitting as the first appellate court is duty bound to reevaluate the evidence tendered before the learned Honorable Magistrate and satisfy itself that the conviction and sentence imposed by the learned magistrate is supported by the evidence on record.

8. The court is also enjoined to draw its own conclusions from the evidence bearing in mind that unlike the learned Honorable magistrate the judge sitting on appeal has not had an opportunity to see or hear the witnesses thus due allowance should be made in that regard. See *Okeno Vs Republic (Criminal Appeal 26 of 2021*) [2024] Kehc (klr) (19 March 2024).

9. The offence of defilement Under Section 8(1) and (2) of the *Sexual Offences Act* which was the main count, was not proved against the appellant thus the learned Honorable magistrate proceeded to convict the appellant in the alternative count of Committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No.3 of 2004.

Appelant's Case

10. The appellant contends that the learned Honorable magistrate erred in law finding him guilty of Committing an indecent act with a child against the weight of evidence.

11. It is his case that the prosecution having failed to establish the main count of defilement the court ought to have acquitted the accused person of all the charges.

12. He goes further to argue that the learned Honorable magistrate in arriving at the decision to convict him, created a new offence thus violating the doctrine of parliamentary legislative sovereignty. According to the appellant a trial court should not venture into the creation of offences for that is strictly the business of parliament.

13. The appellant also argues that the prosecution was not able to establish its case beyond a reasonable doubt thus failing to meet the requirements of Section 107 and 109 of the *Evidence Act* Cap 80 of the Laws of Kenya.

14. In support of that argument, the appellant has placed reliance on Pius Arap Maina Vs Republic 2013 (eKLR) where the High Court held:- "it is gainsaid that the prosecution must prove a criminal charge beyond a reasonable doubt. As a corollary, any evidential gaps in the prosecutions' case raising material doubts must be interpreted in favor of the accused."

15. The appellant further argues that the elements of the offence were not proved and therefore the conviction was unsafe.

16. The appellant has also urged the court to find that he was not properly identified by the victim who also failed to testify as to any overt act committed by him thus his conviction was unsafe.

17. The appellant concludes his submissions by urging the court to find that the evidence on record was insufficient to support the conviction and sentence.

18. It is against this background that the appellant seeks that the conviction against him be quashed and sentenced set aside.

Respondent's Case

19. The prosecution through submissions drawn and filed by Senior Assistant Director of Public Prosecutions George A. Mungáre argues that the offence of committing an indecent act with a child was sufficiently proved thus according to him the conviction is safe and should be upheld. Counsel submitted that the age of the accused person was proved by PW6 the victim's mother to have been 7 years at the time of the commission of the offence.

20. It was further submitted that the offence of committing an indecent act does not require the proof of penetration thus the failure to accept the medical evidence on penetration by the court could not in any way affect the outcome.

21. On the issue of identification counsel submitted that it was unnecessary because the appellant was the father to the victim a fact which was not denied.

22. The respondent maintains that the decision by the learned Honorable court was anchored on evidence and therefore should not be disturbed by this court.

Summary Of Evidence.

23. There a foregoing is a summary of the submissions by both parties in support of the respective positions they have taken in this appeal

24. I have independently examined the record and established that PW1 John Njuguna a Clinician at Nairobi Women's Hospital produced a Gender Violence Recovery Centre as -Pexh 3 as well as a referral -Pexh4 from Fremo Medical Centre where the victim had been attended at on 30th August 2022.

25. According to the witness the victim complained of sodomy by his father which act he alleged was committed on 29th August 2022 at 11pm. The witness stated: "we do not have specific finding when it comes to sodomizing as each patient has his story. There may be injuries or no injuries. The patient had already been started on anti-biotics. We issued Hepatitis B vaccine. No injury was noted."

26. The witness went further on re-examination to state that the absence of an injury does not preclude penetration.

27. This is the medical evidence that the learned Honorable magistrate considered in arriving at the decision that defilement was not sufficiently proved by way of medical evidence. The evidence of this witness therefore was of no value in connection with the alternative charge for which the appellant was found guilty.

28. The victim testified as PW2 upon the voire dire examination by the court he confirmed that he was 7years old and that he knew his birthday to be on 3rd February. He was also able to tell that he was a pupil at Christ Education Centre.

29. The victim appeared to understand the importance of telling the truth but the court found that he was unable to understand the meaning of an oath therefore he gave unsworn evidence.

30. The victim testified as follows:- " I recall a day I was sleeping at home with dad. I was coughing and it was at night. I was sleeping with dad and mom at house. Nothing else happened. I didn't feel pain anywhere. I went to mum in hospital as I was coughing. No one should touch my susu and pupu. No one has ever touched or inserted my private part."

31. The victim gave that evidence on 4th October 2022 when the prosecutor applied to stepdown the witness and there was no objection by the defense. The court allowed the prosecutor to step down the witness and fixed the matter for further hearing on 19th October 2022. It is important to mention here that the prosecution did not give reasons as to why they had to step down the witness.

32. On 19th October 2022 PW3 Irene Wamaitha Waweru from Ngong' an advocate testified that on 20th August 2022 she was called by someone known to her by the name Ann and another by the name Shamila who were tenants at a place she manages in Dagoretti .

33. The witness testified that when she went to the scene, she was told that there was a child who kept crying during the night and the tenants suspected that the child was being abused. PW3 went further to state that she was shown the house and she went into it together with the two ladies.

34. The three were ushered into the house by the house help but the father of the victim was not there. The witness went further to testify that: "he looked sickly. I asked him he said he has an headache and

pukes when he eats. I asked him the problem and did not talk when the house help clobber him and he said the father is doing bad manners to him."

35. PW3 testified that she was the one who decided that they take the child to hospital. The witness in the company of the other ladies took the child to a hospital in Riruta. The doctor examined the victim and gave a referral note to take him to Nairobi Women Hospital. It is this doctor that testified as Pw1 whose evidence was found to be insufficient to establish penetration leading to the main count being dismissed.

36. PW3 went further to state that before she left with the child to Nairobi Womens Hospital the victim's father arrived and she went dropped them off but did not take them to Nairobi Women Hospital. She however received a call from the doctor moments later who was agitated and when he started ranting, she testified that she hang up the phone but went to make a report at Karen Police Station and returned to Dagoretti then Mutuini Police.

37. According to the witness, the OCS was aware of the matter having been informed by the doctor. The doctor prepared a referral note to Nairobi Women's Hospital and the police picked up the victim and escorted him to the hospital. The evidence of this witness raises many questions about the very active role that PW1 played in the whole matter yet his evidence was found to be worthless.

38. PW3 identified the victim's father as being the appellant before court.

39. Upon cross-examination PW3 explained that she abandoned the child with the perpetrator for fear of a confrontation between her and the victim's father but she knew that she was going to report to the police. It is not clear from the testimony of the witness why she thought there could arise a confrontation with the victims' father.

40. The witness Pw3 being an advocate knew better that any one else in her company at the time the necessity to ensure that the victim was properly handled in order to preserve evidence if at all she believed that a sexual offence had been committed. At least as an advocate of this court she owed the victim that duty.

41. PW4 was the house help who testified that the victim was asleep on the 29th of August 2022 when she heard him cry at around 11pm but waited until the following morning to find out from him what was the matter. She went further and testified that the victim informed her in the morning that his dad has been putting something into his buttocks. The evidence of the witness in that regard could not be supported by medical evidence on penetration.

42. PW4 went further to state that the victim was in pain and he cried up to 4am in the morning. At the time of course she could not tell why the victim was in pain.

43. PW4 went further and testified that the victim was unable to tell what it is that his father was inserting in his buttocks. This limb of evidence materially contradicts the evidence of the victim pw2 who said no one touched his buttocks.

44. Pw4 disclosed that she is the one who told the women within the plot namely Mama M and Mama H about the incident prompting them to call another woman with whom they took the child to Fremo Hospital. That woman apparently was Pw3 the advocate.

45. According to Pw4 at the time the child was taken to hospital the appellant was at work and she was the one who called him to come back home. He joined them at Fremo hospital after the doctor had already examined the victim and referred them to Nairobi women Hospital.

46. PW4 further stated that previously the victim had told her that the father did something to him and told him not to tell anyone.

47. PW4 upon cross-examination testified that 'there is a day I beat P since he had made himself dirty'. She went further to state that she told P to tell his mother what the dad had done so that they could know what to do. She also told the court that she later called the mother to the victim PW6 who was not staying with them at the time of the incident. The importance of the evidence of this witness shall become abundantly clear as we progress with the evidence.

48. PW6 was the victim's mother. She had already separated with the appellant but the appellant was taking care of the victim. She says she took custody of the child on 31st August 2022. According to her "the child never complained about dad but said the nanny used to hit him up, give him salt and beat him." The nanny under reference is PW4 who says she got the job at the appellants house through her stepsister who was the appellant's girlfriend.

49. The victim's mother CWW (PW6) stated in her evidence that: "I don't believe the minor was abused."

50. PW5 Clavis Niyongabo a Clinician at Fremo Medical Centre says that he examined the victim on 30th April 2022 when the victim was brought by three ladies, a landlord and a teacher. He stated that the child had been raped by the dad. According to the witness the child told him that he had been raped thrice by the dad. It is important to note that the evidence of the witness materially contradicted that of the victim who said that nothing had been done to him.

51. The victim testified on two different occasions. On both occasions n the victim did not implicate the father in his evidence but the prosecution produced his statement in evidence as proof of commission of the offence. In fact were it not for the statement sneaked into the proceedings by the prosecutor, there would absolutely have been nothing to support both the main count as well as the alternative count.

52. The appellant in his defense testified that he was in a sexual relationship with PW4's sister and it was the sister to Pw4 who brought Pw4 to stay with him.

53. He went further to state that he had separated with Pw6 the victims' mother a position corroborated by PW6.

54. The appellant disclosed in his defense that during the period that he was in a sexual relationship with PW4's sister he had other girlfriends and over time the continued association with those other girlfriends strained his relationship with PW4 who was the house girl. The appellant mentioned that his girlfriend by the name Janet would occasionally visit him in the house and occasionally spend with him in the full knowledge of Pw4.

55. Quite obviously the appellant should have known that his philandering contact would attract not only the wrath of Pw4 but also the sister who had brought her into his house. It is was therefore a no brainer for Pw4 to take action for the sake of the sister. The totality of the evidence discloses that this was a carefully crafted arrangement by Pw4 to stop the appellant from his unchecked amorous engagement with other women knowing to well that the appellant was cheating on her sister. The appellant should haver been wiser in his dealings with his multiple girlfriends.

56. Further , according to the appellant on 28th August 2022 he bought his son a bicycle which he left him cycling and went out. He came back later with his girlfriend Janet and found the son asleep but was coughing. They slept and the following morning he told the house help to take him to school and in the event of anything the teacher would call him. He was not called throughout the day and when he

came back in the evening, he bought the son some medicine over the counter and gave the house help to give him.

57. The appellant went further to state that during the night the victim kept crying until at around 3am in the morning of 30th August 2022. He says that he told his house help (pw4) at around 5:30 am the child should not go to school as he left for work at around 5:30 am.

58. According to the appellant in the afternoon of 30th august 2022 he received a call from his neighbor Shamim telling him that his son was unwell and when he went home, he found that the son had been taken to Fremo Medical Centre. He proceeded there and found that the son had been attended to by the doctor and there he found his landlord and two other neighbors present.

59. The appellant stated that the doctor told him that the son was suffering from pneumonia and they went home at 4:30 pm but at around 8pm while in his house with his son, two officers came and arrested him on allegations that he had sexually abused his son. He denied committing the offence and he was subsequently charged.

60. Notably, the appellant stated upon cross-examination by counsel for the state that "my son P is very jolly and loving. I lived with him from March to August 2022. He was not naughty nor a liar. Our relationship with the mom was okay. She could not frame me up same for my landlady. House help was okay till I noticed changes after I started bringing other women there. She even asked why I was cheating on her sister and I told her to do what brought her there. She takes care of the child. I had given her both my number and my son's- ie the mother so that she can call either in case of any issue. I learned she used to beat my son in court. On 29th I slept with the victim. He was coughing thus in pain and also vomiting. P is a smart boy. It is landlady who said I had sexually abused my son. My son alleged I had sodomized him. The house help is the on who would tell my son to fix me."

61. On re-examination the appellant stated "when I started seeing other people I had not broken up with my house help's sister."

62. In support of the appellant's case, was Joan Kioko who testified DW2, she is a practicing and licensed counselling psychiatrist.

63. According to her after examining P she noticed that he had trust issues and anxiety but did not establish the root of his anxiety. She stated that a child can open up or refuse to open up during dialogue. She said however that she did not ask the child directly if he had been sexually abused because in their practice "we do not ask children direct questions. It did not present a case of sexual assault."

64. The witness went further to state in the victim's case there was no present trauma in his life but the child was dealing with grief of separation of parents.

Analysis And Determination

65. The appellant as well as the respondents have filed their submissions which I have duly considered. Upon analysis of the evidence presented before the learned Honorable magistrate I have noted that the victim when called upon to testify did not implicate the appellant in any way.

66. In the first instance the child when called upon to testify stated that during the night in issue he was asleep with the dad and mom and was coughing at night. He was emphatic that nothing happened that night and he did not feel pain anywhere. The boy was clear that no one has ever touched or inserted anything in his private parts.

67. The prosecutor upon leading that evidence, sought to step down the witness for what she stated to be "I seek to step down witness for proper pre-trial."

68. The question that immediately arises in my mind is what was this that the prosecutor deemed a proper pre-trial. I say so because when the child was later recalled on 19th December 2022 the only thing that happened was the child introducing himself to the court and indicating to the court that he was no longer staying with the dad.

69. The prosecutor on that date sought to produce the statement of the minor which was not objected to and when the child was cross examined, he said "aunty Irene was not nice she tied on legs and hands and beat me. Dad was good to me. I do not fear dad. He is a good person. I love him."

70. I have reproduced that portion of the victim's evidence to highlight the fact that the child did not implicate the father in court as having committed any form of assault let alone sexual assault. The introduction of the victim's statement in evidence was very prejudicial to the appellant.

71. In my considered view the production of the victim's witness statement by the prosecution counsel was calculated at ensuring that the appellant was implicated at whatever cost and the reception in evidence of that statement by the court was grossly unfair to the accused taking into account the totality of the evidence. It was in fact a fundamental breach of the accused person's right to a fair trial.

72. A prosecutor is a minister of justice in a Criminal Justice system. His role in a criminal trial is to ensure that evidence is produced through the conventional means of adducing evidence and allowing the accused an opportunity to test that evidence. In so doing the prosecutor must ensure that the rights of the victim as well as those of the accused persons are protected throughout the trial.

73. It must be understood that it is not the duty of the prosecutor to secure a conviction against an accused person at whatever cost. The prosecutor must remain professional and avoid going beyond the call of duty to sneak evidence on record with the sole aim of securing a conviction.

74. From my analysis of the evidence, it is clear that the prosecutor went beyond the call of duty to act fairly.

75. It is now internationally accepted that the prosecutor's duty is goes beyond securing convictions. To prosecute with vigor and robustly is permissible but fairness throughout the process is most crucial. The right to a fair trial must never be compromised.

76. For close to a century now in the American jurisdiction, courts have cited with approval the iconic words of Justice Sutherland on the role of a prosecutor in a criminal trial.

77. In Berger v. United States 294 U.S. 78,88(1935), Justice George Sutherland, who was part of the Schechter majority, said the following about the role of the prosecutor:

> [He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

78. The victim in this case was clear on the two occasions that he appeared before the court that the dad has always been good to him and he had no complain against him whatsoever. The person who recorded the statement should have been called by the prosecutor to produce the statement and have his testimony tested.

79. The failure to call that crucial witness in my view dealt the prosecutions case a fatal blow. It is possible that had he been called he would have given evidence that would have been adverse to the prosecution. That is the inference I draw in the circumstances of this case.

80. The offence of committing an indecent act with a child is a very serious offence. The learned Honorable magistrate therefore ought to have approached the conduct of the trial with great circumspection considering that PW4 who was the person who generated the complaint against the appellant was aptly described by the child victim in the following manner;- "aunty Irene was not nice she tied on legs and hands and beat me. Dad was good to me. I do not fear dad. He is a good person. I love him."

81. The character of PW4 was therefore that of a person who could not be trusted and whose word could not by any standard be relied upon by the trial court to convict the appellant of such a grievous offence.

82. PW4 clearly had a motive to implicate the appellant with wrong doing. She was admittedly a sister to the appellant's girlfriend. The appellant said that they were not in very good terms because of his flirting with women while still in a relationship with Pw4's sister.

83. The appellant was openly adulterous from his own evidence in defense, he admitted in engaging in adulterous acts which would obviously attract the wrath of a reasonable woman in the circumstances.

84. The urge on the part of PW4 to punish the appellant could not be ruled out. The court should therefore have been careful in accepting her evidence in the circumstances.

85. The evidence of PW4 was in the nature of circumstantial evidence. Based on her having been in the house at the time when she says she heard the child cry.

86. The appellant in his defense did not deny that the child cried that night however, according to the appellant the child cried because he was unwell the night in question a fact that the child victim PW2 confirms in his evidence.

87. The learned Honorable magistrate in his judgment stated " that there was no sufficient medical evidence to prove that the complainant's anus was penetrated by a penis but there is evidence of committing an indecent act as the minors clothes were removed and something inserted in his anus thrice by the accused during which period he was crying uncontrollably until 3 am and the bedroom door was locked."

88. The conclusion by the magistrate was not supported by evidence tendered by the child victim in open court. The statement tendered by the prosecutor was a total contradiction of the victim's evidence. The contradiction taken together with the motive of PW4 should have raised a doubt in the trial courts mind. The benefit of that doubt should have gone to the accused.

89. In Paramjeet Singh Vs State of Uttarakhand , AIR 2011 SC 200 (para 45) : (2010) 10 SCC 439, the court held that if motive is proved , that would supply a link in the chain of circumstantial evidence , but the absence thereof cannot be a ground to reject the prosecution case. The evidence of PW4 has been shown to have had a motive behind it and therefore the court should have drawn an adverse inference to it and rejected the prosecution's case.

90. The conclusion by the learned Honorable magistrate was drawn clearly from the evidence of PW4 and the statement produced by the prosecutor marked P-exh6. The statement allegedly written by P Gitaka Kimani PW2 was not put to the child in order for him to confirm whether the contents thereof were given by him to the police.

91. The witness did not adopt the statement in his examination in chief. It was indeed produced by the prosecutor. The admission of the statement was therefore improper in the circumstances and prejudicial to the appellant.

92. All the other prosecution witnesses gave basically what amounted to be here-say evidence, none of them was present at the time of the commission of the alleged offence and simply relied on the information supplied to them by PW4.

93. It is important to note PW3 Irene Wamaitha Waweru an advocate of the High Court of Kenya testified " I was just told there is a child that has been crying at night and they fear he has been abused we were ushered in the house by the house help--- the father was not there. It was a school day and was not in school. He looked sickly . I asked him he said he has a headache and he pukes when he eats. I asked him the problem and did not talk when the house help prodded him and he said the father is doing bad manners to him."

94. The witness corroborated the appellants defense that the child was indeed sick as at the time she went further into the house.

95. The evidence of this witness taken together with the appellants defense that it was the house help was out to fix him leaves no doubt in my mind that this case was a pure case of a frame up against the appellant.

96. I therefore proceed to find that the case against him was not adequately proved, the conviction was therefore unsafe and should therefore be quashed.

97. In conclusion therefore, the appeal succeeds on both conviction and sentence. The conviction is quashed and sentence set aside. The appellant shall be released forthwith.

98. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Ms Bonyo for the Appellant

Mr. Chebii for the Respondent