REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.59 OF 2015

DAVID KIMATHI KIMOTHO .....APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in criminal case No. 574 of 2012 of the Principal Magistrate's Court at Tigania by Hon. J. W Gichimu – Ag. Principal Magistrate)

JUDGMENT

DAVID KIMATHI KIMOTHO, the appellant, was convicted for the offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence were that on 17th April 2012 at [particulars withheld], Tigania West District of Meru County intentionally and unlawfully caused his penis to penetrate the vagina of **L K** a child aged 9 years.

The appellant was sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Anampiu, learned counsel. He raised three grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in fact by relying on contradictory prosecution evidence.

2. That the learned trial magistrate erred in law and in fact by failing to make a finding that the offence was not proved to the required standards.

3. That the learned trial magistrate erred in law and in fact by meting out a harsh sentence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case were briefly as follows:

While the complainant and the appellant were alone at home, the latter called the former behind the house where he defiled her. When the complainant's mother returned and interrogated him, he ran away.

In his defence the appellant denied any involvement in the offence and contended that when he was in the

complainant's parents' home waiting for some tea, the complainant's father went behind the house while her mother was washing clothes. This is when the complainant's mother alleged that he had defiled the complainant.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

The charge was erroneously drafted. It cited a nonexistent section. It ought to have read contrary:

> **... to section 8(1) as read with section 8(2) ...**

My perusal of the record revealed that the appellant understood the charge against him and fully participated in the trial. He was therefore not prejudiced in any way. The error is curable under section 382 of the Criminal Procedure code.

The prosecution evidence on record has too many unexplained gaps. The account of the incident by the complainant does not gel with that of her mother and father. Looked alone, it also raises issues of credibility.

L K (P.W1) testified that she was alone at home with the appellant when the latter called her behind the house. This presupposes that at the time, the appellant was behind the house. She further said that after he was through with defiling her, he remained in the house until when her mother returned. When her mother asked the appellant what he was doing in the house, he left. This is when she reported to her mother about the defilement.

The complainant's mother, **L K G** (P.W2) gave a different version. Her evidence was that the appellant paid their home a visit. she served him tea and left for her farm. She left the appellant and the complainant at home. when she returned home to fetch a villager some water, she was attracted by some noise behind the house. when she went to check, she found the appellant zipping his trousers. She asked the appellant what was going on but the appellant said there was nothing wrong. However, when she enquired from the complainant, the latter said the appellant had urinated on her (**amenikojolea).**

These two versions are contradictory and there was no attempt by the prosecution to reconcile them. Logically I do not see how the two can be reconciled.

D G (P.W3) is the complainant's father. He testified that his wife called him and informed him that the appellant was at home to see him. He went home and asked him to wait for him for he wanted to get some more grass for his goats. After he had left, he heard his wife screaming. when he went home he found his neighbours chasing the appellant.

This evidence raises two issues. One, whether the appellant would be that reckless to commit the offence of this nature where the was no opportunity. Two, in his defence, the appellant said that the complainant's father had invited him to his home. Is there a possibility that he walked into a trap? Three, it would appear that his wife was not in her farm as she had testified. He heard her screaming after he had left to gather grass.

The complainant was 9 years at the time of the alleged offence. Going by her narration of the incident, she was either couched or has very good imaginations. A male adult defiling a girl of 9 years in the manner described by the complainant, then one does not need to have any medical background to see the evidence on the complainant. The medical evidence adduced by Dr. Susan Muthoni Mutiria (P.W4) does not support the description of the complainant on what she alleged to have taken place.

The evidence on record was not safe to found conviction on. The law is very clear on what to do where there are reasonable doubts; the same is resolved in favour of an accused person. This is what the learned

trial magistrate ought to have done in this case.

From the foregoing analysis of evidence, the conviction cannot stand. The conviction is quashed and sentence set aside. The appellant is set at liberty unless if lawfully held.

DATED at **MERU** this **26th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE