REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 247 OF 2011

HUMPREY MOBUTU FUNDI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Appeal against conviction and sentence in the Nyeri Chief Magistrates' Court Criminal Case No. 35 of 2010 (Hon. M. Nyakundi) on 19th December, 2011)

JUDGMENT

The appellant was charged with the offence of defilement of a girl contrary to **section 8(1) (3)** of the **Sexual Offences Act No. 3 of 2006**; the particulars were that on the 3rd day of September 2010 in Nyeri County within Central Province, the appellant intentionally and unlawfully committed an act of penetration of his penis into the vagina of C N M, a girl of 13 years old.

In the alternative, he was charged with the offence of indecent act with a child contrary to **section 11(2)** of the **Act** aforesaid and in this alternative count, it was alleged that on the 3rd day of September 2010 in Nyeri County within Central Province, the appellant intentionally and unlawfully committed an indecent act with C N M by causing his penis to touch her vagina.

The appellant was convicted of this alternative count and sentenced to serve ten years imprisonment; he appealed against conviction and sentence and in his petition of appeal he listed his grounds of appeal as follows:-

1. The learned trial magistrate erred in law and fact in shifting the burden of proof from the prosecution to the defence.

2. The learned trial magistrate erred in law and fact in appreciating, admitting and believing the evidence of the complainant (PW1) despite lack of corroboration.

3. The learned trial magistrate erred in law and fact in failing to hold that the prosecution evidence by the witnesses was contradictory and inconsistent.

4. The learned trial magistrate erred in law and fact in convicting the appellant on the 2nd count (it was actually the alternative count) against the weight of the evidence.

5. The sentence was manifestly oppressive and excessive.

6. The learned trial magistrate erred in law and fact in convicting the appellant on the 2nd count when

there existed no evidence to support the same.

7. The learned trial magistrate erred in law and fact in dismissing the defence evidence.

8. The learned trial magistrate erred in law and fact in failing to hold that the prosecution had failed to prove the case to the required standard.

Mr Kioni for the appellant collapsed all these grounds into one ground when the appeal came up for hearing and submitted that the evidence against the appellant was hearsay and his conviction was solely based on the uncorroborated evidence of the complainant. Counsel submitted that though the doctor who examined the complainant testified that she sustained bruises on her private parts, he admitted that those injuries were not necessarily attributable to sexual assault and that there was no connection between the bruises and the alleged defilement.

Ms Maundu for the state opposed the appeal and submitted that the complainant's evidence that the appellant attempted to penetrate her genital organs was credible and that there was no reason why she could have thought of framing the appellant. Counsel submitted the complainant's resistance to the appellant's attempt to penetrate and the ensuing struggle between them could probably have caused the bruises on the complainant's sexual organs. Counsel urged that the alternative count of indecent assault was proved to the required standard.

Inorder to appreciate where counsel are coming from in their submissions, it is necessary to have a fresh look at the evidence at the trial. More importantly, this court being the first appellate court has the legal obligation to evaluate the evidence afresh and come to its own conclusions irrespective of the factual conclusions that the trial court came to noting, however, that it is only the trial court that had the advantage of hearing and seeing the witnesses. The oft-cited decision in this regard is Court of Appeal for East Africa decision in **Okeno versus Republic (1972) EA 32** where it was said:-

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).***

The complainant's testimony was that on 3rd September, 2010 at around 8.30 am she went to buy kales from one Mama Roaster at Kengen. She went to the latter's house; it is not clear whether she found Mama Roaster there but she testified that Mama Roaster's 'boy' went to the shamba to collect the Kales for her.

At 9.30 am she met the appellant at his compound talking on phone; he asked her to come to his house after getting the kales because he wanted to send her to her father. She went to the appellant's house as requested; the appellant is said to have opened the door for her when she when she knocked the appellant opened it and welcomed her in the house. While she was seated, the appellant is alleged to have started touching her breasts; he later led her into his bedroom where he removed her pants laid her on his bed and tried to force his penis into her vagina. He could not manage to penetrate despite trying three times because the complainant resisted. He gave up and let go the complainant who left while crying.

While on her way she met a lady but she did not tell her what had happened; it is only when she reached home that she told her sister of her ordeal. Her sister took her to her father **F M W (PW2)** whom she also told about the assault. She was taken to the police at Karatina who referred her to hospital for treatment in the same town; they later referred the complainant's case to Nyeri police.

It was the complainant's testimony that she knew the appellant because he was her father's friend and that

he used to visit their home.

Upon cross-examination the complainant testified that she could not recall the date she was assaulted by the appellant. She also testified that there is a shamba the appellant had given her father to till but she could not tell who harvested the produce or for how long her father had been ploughing the land.

She also testified that while on her way home she met a security officer called Mama Rita at the gate leading into the camp where the appellant lived and worked; it is not clear whether this security officer is the lady she referred to in her evidence in chief but besides this officer, there were other people that she saw at the Kengen camp as she left the complaint's house and whom she was familiar with. She said that the appellant told her to tell her father to come to his (the appellant's) house. The complainant also admitted that she knew the appellant's wife though she did not know her by name. Her aunt, according to the complainant worked as a nurse at Karatina hospital where she was treated but that she was not present when she went for treatment. The complainant also told the court that there were two old men at the camp whom she identified as Njogu and Munene and that the latter gave her father Kshs 100/= for his fare to Nyeri.

The complainant's father, **F W (PW2)** testified that on 3rd September, 2010 he left his children home but asked them to collect kales from Kengen; his daughter, the complainant, went for the vegetables but after sometime she came back crying. She complained to him that she had been 'raped' by the appellant when she passed by his house; she also told him that the appellant had not told her why he wanted her in her house. He went to Kengen to report but he did not find the appellant's boss. He then went to one Munene who advised him to take the child to the hospital. He reported the matter to Karatina police and got the complainant treated at Karatina hospital. The police at Karatina referred him to Nyeri police station. He admitted that he had known the appellant for five years and in fact the appellant had at one time leased out his parcel of land to him to plough but he could not continue using it because he did not have money. He denied that the appellant had loaned him any money.

The witness also testified that the appellant called him while he was at the hospital at Karatina but then he switched off his phone apparently because he did not want to talk to him. He denied that there was any grudge between him and the appellant but he admitted that his sister in law was a nurse at Karatina hospital where her daughter was treated. He also admitted Tumutumu was nearer to Kengen, where the complainant could apparently have been treated, than Karatina hospital.

Humphrey Wanjohi (PW3) testified that he was together with the complainant's father when the complainant accompanied by her sister came to him crying and reported that she had been defiled by the appellant; this was at around 11 am. Together they went to the appellant's place of work but they were advised at the gate, by one Munene, to take the complainant to the hospital.

The complainant's mother **J N (PW4)** told the court that she was informed of her daughter's defilement by **Wanjohi (PW3);** she followed her husband to Karatina hospital where the complainant had been taken for treatment. She testified that her daughter had been born on 2nd January, 1997 and produced a birth certificate to that effect. The appellant was a person known to her because he had been her husband's friend for six years and that he used to visit them. She was aware of the land which the appellant had leased to her husband before. She also confirmed that her sister worked at Karatina hospital.

The doctor who filled the P3 form for the complainant was **Dr Alex Muturi** from Nyeri Provincial General Hospital; he did not examine the complainant but the source of his information was, according to his evidence, a clinical card from a hospital he could not recall. He could not, however, verify the information in the clinical card. It was his evidence that the cause of the bruises was not indicated in the P3 form and they could have been caused by anything. He also admitted that the discharge on the complainant's pants could have been as a result of a different infection and not necessarily as a result of defilement.

The police officer who received the complainant's report, police constable **Mercy Moraa (PW3)** testified that she also took the complainant to hospital though she did not indicate in her evidence which hospital

they went to. She collected the results of the complainant's examination from the hospital the following day and handed them over to the complainant's mother. It was her evidence that she did not know what those results said. She then referred the complainant and her father to Nyeri police station. Police constable **David Ali (PW7)** of Nyeri police station testified that the complainant was referred to the station because it was within this jurisdiction that the offence was committed. He received the complainant and her parents but they did not have the results from Karatina hospital when they reported the case at his station. Although he received the report on 3rd September, 2010, it was not until the 8th September, 2010 that he escorted the complainant to Nyeri Provincial Hospital. According to him, the appellant was brought to the station by his employers on 7th October, 2010; it is then that he re-arrested him.

Dr Wilson Gichuki (PW8) examined the complainant at Karatina Hospital; according to his findings the complainant's genitalia had a whitish discharge and there were bruises on the labia minora but no blood was seen. No spermatozoa was seen or puss cells. Upon cross-examination, the doctor admitted that the discharge was a normal discharge and could not be attributed to any cause. As for the bruises, the doctor said that they could possibly be as a result of friction of the body of either the complainant herself or the complainant's body with that of somebody else; it was his evidence that they could have been occasioned by several causes and not necessarily by defilement.

The appellant gave a sworn testimony when he was put on his defence; he also called two witnesses one of whom was his wife. In his evidence, he testified that he came back home at 8.am on the material day having worked overnight the previous night. There were workers outside his compound cleaning; his wife **Purity Mwikali (PW2)** was at the verandah outside their house washing clothes. He went to sleep but asked his wife to wake him at 12.30 pm so that he could go and see the complainant's father over the land that he had been leasing to him. According to the appellant, he wanted to stop him from using it. When his wife saw the complainant passing by, she called her into the house; she entered the house and the appellant sent her to her father.

At 2.30 pm the appellant's colleague called him and told him that he had defiled the complainant; he asked him to call the complainant's father and indeed when he called him, the latter told him that he had defiled his daughter. The appellant called the assistant chief who in turn referred him to corporal Matthews. On 4th September, 2010, he was told that the matter had been taken over by the police.

A week after **Ali (PW7)** called the appellant and asked him about the defilement and whether he could reconcile with apparently the complainant or her parents. The appellant thought he was being framed and therefore insisted that he was ready to go to court and in fact, he later presented himself to the police. The appellant further stated that he had a wife with four children and that he had been friends with the appellant since he went to Sagana several years before. He denied having defiled the complainant or even touched any part of her body.

The appellant's **wife Purity Mwikali (DW2)** testified that she lived with the appellant and that she is the one who called the complainant to their house on the morning of 3rd September, 2010 so that her husband could sent her. She also testified that this was not the first time the complainant came to their house and that the complainant's family and her family had no grudge at all and were infact friends. When they were informed that the appellant had defiled the complainant, they reported the matter to the sub-chief and later to Marua police station but not step was taken on their complaint.

The appellant also called one of the workers employed as a cleaner and who was cleaning outside the appellant's house on 3rd September, 2010 when the appellant arrived to his house from work; the worker, **Daniel Mwailu Masai (DW3)** testified that indeed he saw the appellant's wife call the complainant to her house; both of them entered the house and came out together. He also testified that he knew the appellant and his wife as people who were living together.

That far the evidence went.

From the evidence adduced in the trial court, it is not in dispute that the complainant's family and that of the appellant were not only known to each other but they were also friends and their members occasionally exchanged, what I think were courtesy visits. On 3rd September, 2010, the complainant came to the appellant's house; this was not one of the usual visits that members of these two families exchanged but the complainant was invited by the appellant or his wife when the complainant passed by.

According to the appellant, the complainant was only invited to his house inorder for him to send her to her father on an issue respecting the land he had apparently been leasing from the appellant; that such land existed was not an issue because it was alluded to by the complainant, her parents and the appellant together with his wife in their evidence.

It is also apparent from the evidence that the complainant visited the appellant's house in broad daylight; it was between 9 and 9.30 am and, more so, there were people in the appellant's compound or within the vicinity of the appellant's house who saw the complainant enter and exit the house. Among them was **Daniel Mwailu Masai (DW3)** who was then one of the workers employed as a cleaner by the appellant's employer. Also present was the appellant's own wife (DW2) who testified that indeed she is the one who called the complainant to her house when she saw her pass by. The evidence of the presence of all these people at the material place and time was not controverted.

With the presence of all these people it looks doubtful to me that the appellant could have gone out of his way to defile or attempt to defile the complainant particularly so in the presence of his own wife.

Although the complainant testified that the appellant attempted to penetrate her genital organ at least thrice but failed at every attempt mainly because she succeeded in resisting the appellant's vain attempts, my evaluation of her evidence and the surrounding circumstances leads me to the conclusion that the complainant was not truthful in this regard; I say so because the complainant was only aged 13 and her alleged resistance could not possibly have matched the strength of a full grown adult, married with four children, if he had set out to defile her. Such a man would have probably succeeded in his illicit endeavor and even if he had failed, as the complainant wanted the court to believe, traces of his efforts would have been clear for all to see.

Insertion of a genital organ of an adult into the genital organ of a minor of thirteen years or even an attempt to do so is no doubt a painful experience to the victim and I doubt the complainant would have been able to bear such painful episodes on three occasions without any form of reaction that would have probably attracted the attention of those that were within their vicinity. I do not believe the complainant's evidence that she could not have screamed merely because the appellant was lying on her when she could, on the other hand, succeed in fending off his efforts to insert his penis into her vagina not once but thrice.

Further, it is rather curious that when the complainant finally regained her freedom she did not tell any of the people within the appellant's house's compound that the appellant had assaulted her. According to her own testimony, she was familiar with these people including the security officer whom she identified as Mama Rita; it is doubtful that the complainant would have silently overlooked all these people and hidden from them the ordeal that she had gone through. It would have been logical for her to tell any of them or those people would have been able to notice there was something amiss with the complainant if at all she had just emerged from the sort of struggle that she testified about, more so if she was crying as she alleged.

I am also cautious to note that if there was any offence was committed and which was associated with the complainant's interaction with a male person, the appellant was not the first man or male that the complainant met or interacted with before she went back home. It was her testimony that when she went to get kales from one Mama Roaster, it was not Mama Roaster who picked the vegetables for her but mama Roaster's 'boy'. As noted earlier, it is not clear from the evidence whether the said mama Roaster herself was present or not but for purposes of determination of the question before court, the possibility that the complainant could have interacted with any other man, besides the appellant, in a way that could have resulted into an offence being committed could not be ruled out.

More importantly, however, the medical evidence produced in court was not conclusive as to what may have caused the alleged bruises on the complainant's genitalia; it did not also support the allegation that the appellant had committed the offence for which he was convicted and, at the very least, it did not corroborate complainant's testimony.

There was no indication in the P3 form of the type of weapon or weapons that may have caused the complainant's injuries; in their evidence the medical experts, **Dr Alex Muturi (PW5)** and **Dr Wilson Gichuki Kareithi (PW8)** were in agreement that the bruises on the complainant's genitalia could not be solely attributed to defilement or an attempt to such an act; according to Dr Muturi, the bruises could be caused by 'anything'. On his part, Dr Gichuki went further to explain that such bruises could occur either as a result of friction of one's body or friction between one body and that of another person. As far as the discharge on the complainant's pants was concerned, this doctor testified that it was a normal discharge and not be attributed to any particular cause. His colleague was of the view that it could have arisen as a result of an infection but not from defilement.

While I am mindful that the appellant was convicted of the offence of indecent act with a child contrary to **section 11(1)** of the **Act**, the evidence upon which this offence is alleged to have been proved cannot be isolated from the evidence proffered in proof of the principal count; one common thread that runs through both aspects of evidence is their credibility. An alternative count cannot be sustained merely because there is no sufficient evidence to prove the principal count; a conviction on either is based on the same standard which is proof beyond reasonable doubt.

If, for instance, the appellant was charged with but could not be convicted on the principal count of defilement because of the bruises on the complainant's genital organs could have been occasioned by a myriad of causes, a conviction on the alternative count of indecent act with a child will not hold if the only evidence of contact of the appellant's organs with those of the complainant (which is the definition of 'indecent act' according to **section 2** of the Act) has been discounted. I must not be misunderstood to be saying that whenever genital organs of two persons come into contact there must be some sort of bruises because even the medial experts themselves have discounted this notion; however, where the prosecution wants to prove contact of genital organs of two different persons on the basis that one of them sustained bruises, then such a proof falls short when it is demonstrated that the bruises could have been caused by anything else including the friction of the victim's own body parts.

With all the uncertainties and possibilities in the evidence against the appellant, I am unable to reach the same conclusion that the learned magistrate came to, that the offence of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act** was proved against the appellant beyond all reasonable doubt. I will for my part hold, for reasons I have given, that there was sufficient doubt as to whether the appellant committed an indecent act with the complainant as to be culpable under **section 11(1)** of the **Sexual Offences Act**. I will, accordingly, allow the appeal, quash the conviction and set aside the sentence. The appellant is therefore set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 22nd July, 2016

Ngaah Jairus

JUDGE