REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 86 OF 2009

S K N……………………………………..…...............…..………APPELLANT

VERSUS

REPUBLIC…………………………………......................……RESPONDENT

(Appeal against conviction and sentence in Karatina Senior Resident Magistrate Court Criminal Case No. 890 of 2006 (Hon. L. Mbugua) in a judgment delivered on 7th April, 2009)

JUDGMENT

The appellant was initially charged with the offence of defilement contrary to **section 145 (1)** of the **Penal Code;** according to the particulars of the offence, on the night of 7th and 8th September, 2006 in Nyeri District in Central Province the appellant had carnal knowledge of a girl under the age of sixteen years namely NNN.

The charge was subsequently amended to include an alternative count of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act, No.3 of 2006**. Under this alternative count, it was alleged that on 7th and 8th day of September, 2006 in Nyeri District of the Central Province, the appellant unlawfully and intentionally assaulted NNN a girl under the age of 11 years by touching her private parts.

At the conclusion of the trial, the learned magistrate held that the prosecution had proved the alternative count beyond reasonable doubt and convicted the appellant accordingly; he was sentenced to twelve years imprisonment.

The appellant has appealed against the conviction and the sentence; in the petition which he filed in court on 27th April, 2009 he faulted the learned magistrate's decision on the following grounds:-

1. The trial magistrate erred in law and in fact in failing to consider that the evidence adduced by complainant was false because there was nowhere she told the court that she screamed to alert members of the public that there was something wrong going on;

2. The trial magistrate erred in law and in fact by failing to find that PW1 did not report the offence to anyone where she slept the whole night until the following morning when she revealed the matter to her mother;

3. The trial magistrate erred in law and in fact by failing to consider that the only evidence adduced was from the complainant and her mother;

4. The trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt yet there was no evidence linking the appellant to the offence for which he was convicted;

5. The learned magistrate erred in law and in fact in considering extraneous matters that were not considered in evidence to reject the appellant's defence;

6. The learned magistrate erred in law and in fact in failing to consider that the complainant was taken to hospital for examination six days after the alleged commission of the offence;

7. The learned magistrate failed to consider a standing grudge between the appellant and the complainant's father and mother over sale of land.

At the trial only five prosecution witnesses testified; these were the complainant herself **(PW1),** the complainant's mother **(PW2),** the investigations officer**(PW3),** the area chief **(PW4)** and the doctor **(PW5).**

According to the complainant, on the evening of 7th September, 2006 she was passing through the appellant's compound on her way back to her family house when the appellant accosted her and took her to his house. The appellant is said to have locked the house from inside, forced the complainant to his bed and defiled her. The complainant testified that the appellant put his genital organs inside her private parts; he repeated these acts on two more occasions during the night before the complainant left on the morning of the following day. The complainant testified that when the appellant sexually assaulted her, she cried loudly but the appellant threatened to stab her with a knife.

The complainant's mother testified that she did not find the complainant at home on the night of 7th September, 2006 when she came back home; she went looking for her at the appellant's sister's house which was apparently in the same compound as her own house but she could not find her. Sometimes in the night, her husband asked her to check whether the complainant could be in the appellant's house which was also in the same homestead. This witness testified that she then took one Alice along with her and went round the appellant's house; they went back to their house apparently after not getting any indication that the complainant could have been in the appellant's house.

The witness testified that while in the house they could hear faint cries of what she thought could have been the complaint's coming from the direction of the appellant's house; apparently, they ignored these cries and that it was not until 6.30 am when she saw her daughter, the complainant coming back home. The complainant told her that she had slept in the appellant's house where the appellant is said to have slept on her. She claimed that the complainant told her that the appellant threatened her with a sword.

This witness further testified that she checked the complainant's private parts where she noted what is described in the record as "slimy substance". She told the court that she immediately went to a nearby health centre together with the appellant for treatment but were referred to Karatina. Later she reported the matter to the police at Karatina who gave her a P3 form and referred the complainant to Karatina hospital. The witness told the court that the appellant was later arrested because he threatened to kill her husband who was also the complainant's father.

This witness said that the complainant and the appellant are step-children; they shared the same father and that she brought the appellant up because his mother had died many years before.

The investigating officer, **Police Constable Mercy Kariuki (PW3)** testified that the complainant's mother made the complaint about her daughter's defilement on 13th September, 2006 at 3.40 pm. She testified that she is the one who took the complainant to hospital where she was treated and discharged the same day. She told the court that she arrested the appellant on 22nd September, 2009 and charged him with the offence of defilement.

The chief (PW4) of the area where the complainant and the appellant hailed from testified that indeed he arrested the appellant upon the request of the officer in charge of Karatina police station. In cross-examination, the chief testified that there was a pending dispute apparently between the complainant's parents and appellant over land and tea.

The final witness for the prosecution was **Doctor Amil Wasiq Kuresh (PW5)** who was a medical officer at Karatina hospital. He testified that the P3 form in respect of the complainant was completed by one Dr Kimanthi who could not attend court because he had been transferred to Mukurweini; he told the court that he was acquainted with Dr Kimanthi's handwriting and signature and thus he could competently tender evidence in respect of that report and produce it in court.

According to the doctor's report, the complainant was examined on 14th September, 2006 and in his findings the complainant was in fair general condition. He established that the complainant's libia minora and majora were intact and had no injuries of any sort. The hymen was intact and he was of the opinion that there was no penetration. There was also no discharge at all. A vaginal swab established that there were no traces of spermatozoa.

When the court ruled that he had a case to answer, the appellant gave an unsworn testimony and stated that on the evening of 7th September, 2009 he was at one Ngari Muchiri's home where he was employed as a casual labourer. He left at about 9 pm and went back to his house.

The appellant testified that he was at arrested at the chief's office on 23rd September, 2008 when he went to make a complaint against someone he had quarrelled with. He denied ever having committed the offence for which he was charged and convicted.

That was the evidence that was tendered at the trial.

It has been necessary to go over the evidence as presented at the trail not only because it is the appellant's entitlement but also because it is necessary for this court to evaluate the evidence afresh and come to its own conclusions; it is only then that this court can make its determination as to whether the trial court's decision was properly arrived at and therefore should be upheld or whether the conviction should be quashed and the sentence set aside. (See the Court of Appeal decision in **Okeno versus Republic (1972) EA 32** at page 36).

The complaint's evidence was pivotal in the decision that the learned magistrate arrived at; as noted, she testified that the appellant did not just touch her private parts with his genitals but that he inserted his penis in those parts on three different occasions on the night of 7th September, 2009. In support of this evidence, her mother testified that she noticed a discharge from the complainant's private parts on the morning of 8th September, 2009.

It is appreciated that the appellant was convicted of the offence of indecent act with a child which may not require proof of any sort of injuries on the complainant's genitals; however, if the complainant was sexually assaulted in the manner she described there would ordinarily be some traces, however minimal, of such assault. It is doubtful that the appellant would insert his genital organs into the complainant's private parts on three different occasions during the night he spent with the complainant and leave no single trace of this assault.

It is noted that the complainant's mother testified that she noticed a discharge described in the proceedings as a "slimy substance" coming from the complainant's private parts; I agree that the so-called slimy substance would have been an aspect of the traces I have in mind but this evidence was contradicted by the doctor who examined the complainant and whose evidence not only established that there was no discharge of any sort from the complainant's private parts but also found the complainant to be normal in every respect.

Looking critically at the evidence in its entirety and more particularly that of the complainant, her mother

and the doctor's evidence, I am persuaded to conclude that just as the prosecution could not prove the principal count of the offence defilement, the credibility of the evidence of the alternative count of indecent assault was highly in doubt.

It is also baffling that when the complainant's father asked the mother to check whether the complainant was in the appellant's house, she opted to quietly walk around the house rather than enquire from the appellant himself. It is equally intriguing that she could hear cries that most likely could have been her daughter's coming from the appellant's house direction only after she had gone back to her house. And even so she made no attempts to investigate whether the cries were indeed coming from the appellant's house but chose to ignore them until the complainant resurfaced the following morning!

One of the prosecution witnesses, the area chief (PW4) testified in cross-examination that there was a pre-existing dispute between the appellant, his father and the complainant's mother; this aspect of the evidence was not considered in the learned magistrate's judgment; I suppose if she had considered this evidence, she would probably have come to a different conclusion.

Although the learned magistrate had the advantage of seeing and hearing the witnesses, I find that the inconsistencies, contradictions and uncertainties in their evidence too glaring to support any safe conviction; in a nutshell, I am of the humble view that it cannot be said with any certainty that the offence of indecent assault was proved against the appellant beyond all reasonable doubt. I would in the circumstances allow the appellant's appeal, quash the conviction and set aside the sentence. The appellant is therefore set at liberty unless he is lawfully held.

Signed, dated and delivered in open court this 24th day of April, 2015

Ngaah Jairus

JUDGE