REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT NYERI.

CRIMINAL APPEAL NO. 121 OF 2012.

SIMON WERU MWANGI :: APPELLANT.

VERSUS

REPUBLIC :: RESPONDENT.

(Being an appeal from the original conviction and sentence of L. Mutai - SPM in Criminal Case No. 410 of 2011 delivered on 17/7/2012 at Karatina)

J U D G M E N T.

1. The appellant herein Simon Weru Mwangi was charged on 13/5/2011 with the offence of defilement contrary to section 8 (1) (2) of the Sexual Offences Act. The particulars being that on the 11th day of May, 2011 at [particulars withheld] village in Mathira East District within Nyeri County, intentionally caused his penis to penetrate the vagina of a child aged 5 years.

2. On 7/5/2012, the prosecution applied to amend the charge with regard to the section of the law the appellant had been charged with. The appellant did not object to the application. The charge as amended and read out to the appellant who pleaded not guilty.

3. The amended charge was one for defilement contrary to section 8 (1) as read with 8 (2) of the Sexual offences Act No. 3 of 2006. The particulars of the charge remained unchanged. The appellant pleaded not guilty to the amended charge.

4. At that juncture, the prosecution closed its case and the appellant said that he would submit on if there was a case to answer. He attended court on 5/6/2012 and made submissions on the same.

5. After hearing the prosecution and defence case, the learned trial magistrate found that the charge of defilement was not proved and proceeded to convict the appellant on the charge of sexual assault contrary to section 5 (1) and 5 (2) of the Sexual Offences Act No. 3 of 2003. The appellant was sentenced to 30 years imprisonment.

6. The appellant being aggrieved by the decision of the learned trial magistrate filed an appeal raising the following grounds of appeal:-

> ***(i) That the Hon. trial magistrate erred in law and facts in founding a conviction based on the evidence of a single identifying witnesses but failing to warn herself of the dangers inherent therefore (sic).***

(ii) That the Hon. trial magistrate erred in law and facts in founding a conviction (sic), failing to find that section 49 (f) of the Constitution was violated.

(iii) That the Hon. trial magistrate erred in law and facts in founding a conviction (sic), failing to find section 199 CPC violate.

(iv) That the Hon. trial magistrate erred in law and facts in founding a conviction in (sic) reliance on contradictory and or inconsistent evidences (sic) of the prosecution witnesses.

(v) That the Hon. trial magistrate erred in law and facts in founding a conviction based on the rejection of his defence (sic), failing to give cogent reasons for its rejection.

7. The appellant prays that his appeal be allowed, the conviction quashed and the sentence set aside.

8. This being a first appeal, this court is duty bound to evaluate the evidence afresh and reach its own decision. The Court of Appeal in the Case of **David Njuguna Wairimu VR [2010] e KLR** stated that ***"the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."***

9. The evidence adduced at the lower court indicates that the complainant, PW2, a 5 year old girl, was walking from school at around 3 p.m. on 11/5/2011 when, the appellant seized her hand and took her to his house and placed her on a bed. He removed her pant and inserted a finger in her private parts. The appellant did not undress.

10. At that time she was carrying a bag with a book inside. She was wearing a blue dress and a blue pullover, which were produced in court. The court noted that the blue dress and the pullover were dirty.

11. PW2 explained that she agreed to go with the appellant as he promised to buy her mandazi and sweets. On cross examination by the appellant, PW2 indicated that when she met with the appellant, she was in the company of I and M.

12. PW3 testified that on 11/5/2011 at around 5 p.m., she and Mwangi's mother were informed by one Teresa that PW2 and the appellant had gone to his house. PW3 and Mwangi's mother proceeded to the appellant's house where PW3 called out PW2's name and told her to get out. The appellant opened the door and pushed PW2 outside and closed the door from inside. The people who had gathered outside the appellant's house hit the door thereby opening it. They pulled the appellant outside the house and beat him up.

13. PW4, who is PW2's grandmother, testified that on the material day, her granddaughter had not reached home by 4 P.M. and she started inquiring from other school children about PW2. A child told her that the appellant had gone with her. She and others started looking for PW2. PW4 went to look for them at a bar as she was told the appellant promised to give PW2 cakes and money. They also looked for PW2 in tea farms. When she went to the appellant's house she found PW2 outside his house. The appellant was removed from the house and taken to the DO's place and thereafter to Karatina police station. PW2 was given a P3 form after which she was taken to hospital where she was examined, given medicine and treatment notes.

14. On cross examination, PW4 stated that when PW2 came out of the appellant's house she was looking dirty and on checking her saw some mucous substances in her private parts and underpant. PW2 was wearing her school uniform, which was a blue dress and blue pullover. PW4 denied having implicated

the appellant because of a grudge or that he had given her 4 packets of flour in the month of April, 2011.

15. PW5, a minor testified that on 11/5/2011 he was walking home with PW2, and another child when they met the appellant near a cattle dip. He and the other child ran ahead and left PW2 being held on the hand by the appellant. The two went towards the maize plantation in the direction of the appellant's house. PW2 was in school uniform, a blue dress and a blue pullover and she had her small school bag. On cross examination PW5 said that the appellant was drunk and very muddy. They left PW2 because the appellant had seized her. He later told PW4 as to what he had seen.

16. PW6 corroborated the evidence of PW2, 3 and 4 that PW2 was found in the appellant's house. On cross examination, she said that she checked the child and found very dirty like bloody substances. PW2 told PW6 that the appellant fondled her in her private parts and that he is the one who defiled her.

17. On 11/5/2011 at 6.00 p.m., PW7 was at work when he was informed of the incident the subject of this appeal. He went to the chief's camp and found a crowd of people. PW2 was saying that the appellant had touched her private parts and tried to rape (sic) her.

18. PW8 rearrested the appellant and charged him with the offence of defilement after PW2 was examined and treated in hospital. She issued PW2 with a P3 form. PW8 visited the scene of crime and recovered PW2's school bag which had her food container and an exercise book. He produced the said items including PW2's blue school dress, pullover and underpant as exhibits.

On cross examination, PW8 testified that PW2's clothes were soiled with mud.

19. PW1, Dr. Paul Kimathi examined PW2, a child of 5 years of age on 12/5/2011, He noted that she wore a blue tunic dress stained with mud. She was in a fair condition but looked unhappy. At the time of examination, the injuries were a day old. PW2 had small lacerations on the vulva and her hymen was perforated and the vaginal orifice was inflamed. There was tenderness all over the perineum. She had a clear discharge between the labia. Pus cells, red blood cells and yeast cells were found. Grain stains were also seen. There was no spermatozoa in her private parts. PW1 produced the P3 form in evidence.

20. The appellant denied having committed the offence and stated that PW4 had a grudge against him because of some money she owed him. He stated that on 10/5/2011, PW4 warned him to desist from asking for his money or else he would face trouble. On 11/5/2011, he was called by PW4 from a bar where she told him that she would pay his money at the chief's camp. They went there and he was arrested.

21. At the time of hearing the appeal, the appellant submitted that after the charge was amended, he was not given an opportunity to cross examine witnesses afresh on the amended charge. This court notes that the only amendment made to the charge was that of substitution of the words "***Contrary to section 8 (1) (2) of the Sexual Offences Act*"** with the words***"Contrary to section 8 (1) as read with 8 (2) of the Sexual Offences Act."*** It is the finding of this court that the amendment made to the charge did not change the substance of the charge as the charge of defilement was not substituted with another. The appellant was therefore not prejudiced in any way by failure by the prosecution to recall the witnesses.

22. The appellant in his written submissions indicated that the evidence adduced in court did not support the charge. Inasmuch as he is correct, the learned trial magistrate found that the evidence adduced supported the charge of sexual assault contrary to section 5 (1) and 5 (2) of the Sexual Offences Act.

23. In his judgment the learned trial magistrate rightly invoked the provisions of section 186 of the Criminal Procedure Code (CPC) in convicting and sentencing the appellant. Section 186 of the CPC provides as follows:-

> ***"When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence mentioned in that chapter, he may be convicted of that other offence, although he was not***

charged with it."

24. The appellant's submission that no independent evidence was called is not true as there is no indication on the record to show that PW3 was a member of PW2's family. All indications show that she was a young good Samaritan who went to rescue PW2 from the appellant's house.

25. The appellant submitted that there were inconsistencies in the prosecution evidence. A perusal of the record does not disclose any. The medical report was corroborative of PW2's evidence that her private parts had been interfered with. PW2 was found in the appellant's house which corroborates the evidence of PW2 that the appellant was the perpetrator of the sexual assault on her person. Further, PW2's school bag which contained her exercise book and food container was recovered in the appellant's house.

26. The evidence of PW5, a minor to the effect that the appellant got hold of PW2's hand and led her to a maize plantation in the direction of the appellant's house finds corroboration in the presence of PW2 in the appellant's house where she was found by PW3, PW4 and PW6.

27. The appellant's defence of the existence of a grudge between PW4 and himself over some money that PW4 had belonging to the appellant cannot be true. PW2, PW3 and PW5 could not have conspired to spin a web of lies in order for PW4 to evade paying for the four packets of flour that she had allegedly been given by the appellant. I therefore find that this case was not fabricated against the appellant.

28. The appellant submitted that the age of PW2 was not proved as no document was produced to prove her age. As earlier indicated, the appellant was convicted and sentenced for the charge of sexual assault. Proof of the complainant's age was therefore not a pre-requisite in determining the sentence to be meted out to the appellant.

29. This court notes that the proper provisions under which the magistrate should have convicted the appellant based on the evidence adduced was under the provisions of section 5 (1)(a)(i) as read with section 5 (2) of the Sexual Offences Act. The said section provides that:-

5(1) Any person who unlawfully

(a) Penetrates the genital organs of another person with –

(i) Any part of the body of another or that person;.............. is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to life."

30. This court therefore invokes the provisions of section 382 of the Criminal Procedure Code to cure the error on the part of the judgment with regard to the section of the law upon which the appellant was convicted on and I substitute thereof a conviction for the offence of Sexual Assault contrary to section 5 (1)(a)(i) as read with section 5 (2) of the Sexual Offences Act.

31. Section 5 (2) of the said Act sets a minimum sentence of 10 years with a maximum sentence of life imprisonment. In the circumstances of this case, a sentence of 15 years imprisonment will meet the ends of justice. I therefore reduce the sentence imposed upon the appellant from 30 years imprisonment to 15 years imprisonment. The appeal succeeds only to that extent.

DATED and **SIGNED** at **KAKAMEGA** on this 15th day of October 2015.

NJOKI MWANGI.

JUDGE.

DELIVERED, DATED and **SIGNED** at **NYERI** on this 26th day of October 2015.

J. MATIVO.

JUDGE.

In the presence of:-

.... Appellant.

.... Respondent.

.... Court Assistant.