REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.102 OF 2013

CYRUS KIRIMI KIBUNDI ……..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The Appellant **Cyrus Kirimi Kibundi** was charged with defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act No.3 of 2006**.

The particulars of the offence were that on the 12th day of May 2012 in Imenti South District within Meru County did an act which caused penetration with his male genital organ (penis) into the female genital organ of **YK** a child aged 4 years. In the alternative the appellant was charged with the offence of committing an indecent act with a child contrary to **Section 11 (1) of the Sexual Offences Act No.3 of 2006.** He is alleged to have committed the indecent act with **YK** a child aged 4 years by touching her genitalia and body. After a full trial, the appellant was convicted of the main count and sentenced to life imprisonment.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal setting out the following grounds of appeal:

1. **That the learned trial magistrate erred when he relied on contradictory evidence adduced by the prosecution;**

2. **That the trial magistrate erred when he failed to consider that the appellant was not cross examined;**

3. **That the learned trial magistrate erred when he based the conviction on evidence of a single witness;**

4. **That the learned trial magistrate erred in failing to consider that no exhibit was produced before court to connect the appellant with the alleged offence;**

5. **That the trial magistrate erred by rejecting the appellant's defence;**

6. **That the trial court failed to comply with Section 69 (1) of the CPC;**

7. **That the conviction went against the weight of the evidence.**

The appellant urged the court to quash the conviction, set aside the sentence and set him at liberty. The appellant filed written submissions and did not make any further submissions.

When the appeal came up for hearing on 10th November 2015, Mr. Mungai, Learned State Counsel opposed the appeal and contended that the evidence on record was overwhelming; that PW1's evidence was corroborated by PW2 and 3. He further contended that this was a case of recognition and the appellant was recognized as the alleged assailant. With regard to the appellant's defence that the case was a frame up, he submitted that the same was not substantiated and that the court made the correct finding in convicting the appellant. Consequently he urged the court to dismiss the appeal.

As the first appellate court, I have a duty to examine all the evidence adduced in the trial court afresh and arrive at my own independent determinations. See **Okeno v Rep. (1972) EA 32**.

Briefly the prosecution's case was as follows: **PW1 YK** a child of tender years gave unsworn evidence after the trial court conducted a voire dire examination and found her to be intelligent but unable to understand the meaning and nature of an oath. It was her evidence that on the material day, she was in the farm house when the appellant did bad things to her; that he removed her pants and started touching her vagina; that the appellant removed his penis for urinating and inserted it into her vagina whereupon she cried for help. She then went home and found her mother who checked her and she was taken to the police station where she was examined by a doctor. PW1 knew the appellant as her neighbor.

PW2 KM testified that on 12th May 2013 she had given the appellant work in her banana farm and that her daughter PW1 had followed him to the farm. At around 12:00 p.m. PW1's father came back home and she asked him to go and get the minor (PW1) from the farm for lunch. She then proceeded to wash PW1 whereupon PW1 told PW2 that the appellant had done bad things to her. PW2 called PW1's father (PW3) and PW1 repeated the same allegations and informed them that the appellant had removed her clothes pretending he wanted to apply oil on her. She then took PW1 to Maara police post where she was issued with a P3 form which was filled at Kanyakine hospital. It was her further evidence that her daughter (PW1) was very fond of the appellant as she was present where she was born.

PW3 LM reiterated PW2's evidence that on the material day he had gone to work having engaged the appellant in his banana farm as a casual; that the appellant left for the firm accompanied by his daughter (PW1). At about midday he came back to the house whereupon he was asked by PW2 to get PW1 for lunch; that later, PW2 called him to listen to what PW1 was saying and that PW1 informed him that the appellant was applying oil on her private parts. PW3 proceeded to Maara Police Station where he was referred to Kanyakine hospital where PW1 was issued with a P3 form.

PW4 Saberina Kaimathiri a Clinical Officer based at Kanyakine hospital produced a P3 Form in respect of YK a child aged 4 years. PW1 examined PW1 and said that she had bruises, blisters like lesions on the vulva of external genitalia and the hymen was broken. There was bleeding on the vaginal orifice and pus cells and bacteria were seen which was evidence of penetrative sexual intercourse. The degree of harm was assessed as a grievous owing to the psychological effect.

PW 5 PC Patrick Mwaniki a Police Officer based at Karia Police Post received a report of defilement from PW2. He booked the report and escorted them to Mitunguu health centre where they were referred Kanyakine District hospital. He then issued them with a P3 form which was filled at Kanyakine hospital whereupon he later proceeded to arrest the appellant who was identified by PW1's mother.

After close of the prosecution's case the appellant was found to have a case to answer and in his sworn testimony, said that on the material day he was with his friends chewing khat when he was informed that LM (PW3) was looking for him. It was his evidence that he was found in the house of one David where he was arrested by police and asked whether he had problem with M. He denied having ever been employed at his home and that M wanted Kshs.10,000/= or motorcycle. He admitted to have worked for PW3 in 2010.

I have considered the submissions by the parties and the grounds of appeal. In addition, I have reevaluated the evidence on record. To prove an offence of defilement contrary to **Section 8 (1) (3) of Sexual Offences Act,** the prosecution must establish the following ingredients:

1. **That there was penetration of the minor;**
2. **That the minor was aged between 12 to 15 years.**

PW5 produced the birth notification of the complainant (PEX3). It shows that the complainant was born on 21/6/2008. She was 4 years old. The trial court conducted a voire dire examination on the complainant, she was then in nursery school and gave unsworn evidence because she was found not to understand the meaning of the oath. She was indeed a child of tender age.

There is overwhelming evidence to corroborate PW1's evidence that she was defiled. PW1 was examined by PW4, a Clinical Officer who found that the complainant's hymen was broken, had bruises and blood on the vulva of external genitalia and bleeding in vaginal orifice; pus cells, bacteria and spermatozoa were also seen and she was of the view that the complainant was involved in forceful penetrative sexual intercourse – PW2 had examined PW1 and confirmed the injuries to the complainant's genitalia. It is PW1 who informed PW2 and 3 what had happened to her. I am satisfied that the complainant was defiled. The only question is who committed the offence?

PW1 gave a clear and detailed account of the events of that day despite her tender age on how the appellant did bad things to her and that he had removed her pants and touched her vagina and that he had removed his penis for urinating and inserted it on her vagina. Her account of events of that day remained uncontroverted and unshaken even in cross examination. In re examination she reiterated her account events by stating "**accused is the one who did bad things to me".** The incident took place in broad daylight and PW1 knew the appellant. The appellant admitted that he knew PW1. Although the appellant at first denied having worked for PW2 and 3, in cross examination, he agreed that he worked for them in 2010. PW1's evidence was further corroborated by PW2 and 3's evidence who both testified having given the appellant casual work in their farm on that day. The appellant had the opportunity to commit the offence. The evidence of these two witnesses remained uncontroverted throughout the trial. The appellant did not even attempt to cross examine the witnesses on the same. The trial court found that it is the appellant who defiled the complainant and I find that it is that trial court that was best placed to observe the demeanor of the child.

The appellant complained that the court relied on the evidence of a single witness. **Under Section 143 of the Evidence Act,** evidence of one single witness can go to prove a fact unless a particular statute provides otherwise. **Under Section 124 of the Evidence Act,** the court can rely on the evidence of a single witness in a sexual offence provided that the court records the reasons why it believed the said witness. The court will decide whether or not it will believe PW1's evidence.

Whether **Section 169 (1) of the CPC** was complied with; that section provides that any judgment shall be written by the presiding officer, in the language of the court, shall contain part or parts for determination, the decision thereon and reasons for the decision and it shall be dated and signed by the president officer or at the time of pronouncing it. The appellant did not explain in his submissions how the section was flouted. I have read the judgment of the trial court and I am satisfied the court did comply with **Section 169 (1) CPC**.

Whether the defence was considered, I find that the court did consider it and the court found that the defence was not convincing as the appellant was wavering from one point to the other. The court said:

> **"(c) Accused in his defence was not convincing since he was wavering from one point to another raising all manner of issues without facts. He contended that PW3 had his debt but forgot to mention even the value of that debt, which makes his story farfetched. It is also worth noting that on that same day he shared a meal with that family, and these issues came to be known at the time when the complainant was taking a shower when she informed PW2 about the incident. It cannot be said that it**

was in any way pre planned to create any doubt, since that could have happened earlier even before the meal as matter of common knowledge."

The appellant in his defence seemed to suggest that this case was a frame up. He was raising one issue after the other. During cross examination of PW2, he asked if PW2 took him to police station for theft and PW2 accepted that he had earlier stolen her radio and damaged it and that is why she sacked him but that on the material day, he was only doing a casual job for PW2. He first stated that he had a grudge with PW2. If indeed PW2 had the intention of framing the appellant she would not have admitted this fact. With regard to PW3, the appellant contended there was a grudge between them over a debt. He however, did not say who owed the other or how much. Both PW2 and 3 denied the existence of a grudge between them and the appellant. The appellant in his defence denied having ever worked for PW2 and 3 however in cross examination he admitted having worked for them in the year 2010. Defence was inconsistent. The appellant's defence cannot be true and I reject the same as an afterthought and untrue.

The court found the appellant guilty under **Section 8 (1) and (3) of the Sexual Offences Act** and sentenced him to life imprisonment. However, the evidence disclosed that the complainant was aged 4 years and appellant should have been charged under **Section 8 (1) and (2). Section 8 (2)** provides that if the victim is 11 years and less, then the appellant will be liable to life imprisonment. I find that the court erred in convicting the appellant. Under **Section 186 of CPC**, where a person is charged with defilement of a girl under 14 ears and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence under the Sexual Offenses Act, he may be convicted of that offence though he was not charged with it.

Since the evidence disclosed0 an offence under Section **8 (1) and (2) of the Sexual Offences Act**, I hereby quash the conviction under **Section 8 (1) and (3)** and instead convict the appellant under Section **8 (1) and (2) of Sexual Offences Act**. The only sentence under Section 8 (1) and (2) is life imprisonment.

I sentence the appellant to serve life imprisonment. I dismiss the appeal as being devoid of any merit. Right of Appeal – 14 days.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF DECEMBER, 2015.

R.P.V. WENDOH

JUDGE

17/12/2015

PRESENT

Mr. Mulochi for State

Ibrahim/Peninah, Court Assistants

Present in person, Appellant