REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 15 OF 2010

BETWEEN

IDD KABUTO...APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence at Embu Criminal Case No.181 of 2009 by Hon. L.K. Mutai PM on 9th February, 2010)

JUDGMENT

1. The appellant in this case was charged with two counts of the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, No. 3 of 2006*** and two alternative charges of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. He was convicted of the alternative counts and sentenced to ten years imprisonment for each of the alternative counts, sentences running concurrently. He now appeals against conviction and sentence.

2. In his appeal, the appellant contends that he was not examined to prove the charge of defilement. He submits that his age was not taken into consideration as he could not commit the offence. That the learned trial magistrate erred in relying on uncorroborated evidence of the children and that the trial court failed to take into account his defence. The State, on its part, supports the conviction and sentence.

3. The first witness to testify was PW1, a child aged 8 years, who gave unsworn testimony after a *voire dire* examination. She testified how on 27th January 2009 at 9.00am while playing with her friend, the appellant called her friend to his house and she followed them. While her friend was cleaning utensils, the appellant led PW1 into his bedroom, removed her trousers and had sexual intercourse with her. She started to scream but the appellant blocked her mouth. She reported the ordeal to her grandmother and thereafter she was taken to Embu Provincial Hospital.

4. PW2, a child aged 9 years, in her unsworn testimony, recounted how on 27th January 2009, she and PW1 were in one of their friend's house when the appellant called them to his house claiming that he wanted to teach them. The appellant then removed her pants and had sexual intercourse with her. It was her testimony that the appellant defiled the three of them in turns. PW2 reported the matter to her sister and was later taken to Embu General Hospital where she received treatment.

5. PW3, PW1's grandmother, testified that she was called out by neighbours at about 10.00am and learnt that the appellant was defiling a minor. She got out and met the appellant's sister holding PW1. It was her testimony that the appellant fled the scene immediately and she did not know how he was arrested. She did not examine PW1's private parts but escorted her to Embu Police station.

6. PW4, PW2's mother, identified the appellant as her neighbour. Her testimony was that on the material day, she returned home from work when she learnt that her child had been defiled by the appellant. She had by then been taken to the hospital. She followed PW2 up and she told her that the appellant had defiled her.

7. PW5, a Police Corporal attached to Embu Police Station, was the arresting officer. She testified that on 27th January 2009 at about 1.30pm she received the complainants accompanied by their parents who reported that the appellant had defiled them. Later in the day, she arrested the appellant after he was identified to him by the complainants. It was his testimony that he did not recover any clothing as exhibits from the complainants.

8. PW6, the doctor who examined PW1 and PW2 exhibited two P3 forms relating to the complainants. According to the doctor, examination of both PW1 and PW2 revealed that their hymen had been perforated, a sign of sexual penetration. He confirmed that there was no sign of physical injuries on both complainants.

9. The appellant elected to give unsworn testimony. He denied committing the offence and blamed his woes to victimization by a local councillor with whom they had differed over utilization of donor funds for a certain project. He stated that the case against him was fabricated as a way of punishing him. He further stated that complainants had been asked to testify against him and thereafter proceed to the DC's office to receive a reward of Kshs 50,000/=.

10. The duty of the first appellate court is to evaluate the evidence afresh and make independent conclusions bearing in mind that it did not see or hear the testimony of the witnesses.

11. The appellant complains that he was convicted on the basis of uncorroborated evidence of the children. I have scrutinized the record and I conclude that the learned magistrate properly conducted the v*oir dire* and came to the decision that both children did not understand the nature of the oath hence they gave unsworn testimony. The appellant was given an opportunity to cross-examine them and he did indeed cross-examine them.

12. **Section 124** of the ***Evidence Act*** requires evidence of a child to be corroborated but provides an exception for sexual offences. It provides that where the only evidence is that of the alleged victim in which case the court shall receive evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the alleged victim is telling the truth. Though the children gave unsworn evidence, the learned magistrate observed that the appellant was well known to the children at the material time and that their testimony was clear and convincing of the appellant's guilt. Furthermore, the testimony of the two children as it related to the events of the day corroborated each other. In convicting on the alternative counts, the trial court observed thus; *"The evidence on the alternative counts by the prosecution, I have found was clear, firm, hence courts conviction that PW1 and II were telling the truth. I never tended to doubt their evidence as they had not even differed with the accused prior. They were genuine witnesses whose evidence I had no reasons to doubt and which prove all the material ingredients on the alternative counts."* I concur with the findings of the learned magistrate.

13. The appellant complains that he could not have committed the offence for which he was convicted on the ground that he was 65 years of age. The appellant did not raise this issue as a defence and as the matter was one peculiarly within his knowledge, that is, as to whether or not he could not he could perform a sexual act, the evidential burden lay upon him. As this issue was not raised by the

appellant, it was not necessary to examine the appellant to establish the fact he committed the felonious act.

14. The defence that the appellant was framed by a certain councillor was considered by the learned magistrate and rightly dismissed in light of the clear prosecution evidence. Likewise I have considered the defence and I find that it lacks merit. The appellant did not give the name of the councillor implicated in the fabrication nor establish any plausible relationship between the children, the councillor and the devious scheme to implicate him in the offences.

15. The sentence of 10 years imprisonment is the minimum provided under **section 11(1)** of the ***Sexual Offences Act***. It is neither harsh nor excessive and there is no reason for this court to intervene.

16. Consequently both the conviction and sentence are affirmed and the appeal is dismissed.

DATED, SIGNED and **DELIVERED** at **EMBU** this 9th day of January **2014**

D. S. MAJANJA

JUDGE