No. 411/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 122 OF 2011

BENJAMIN KITONYO MUSEMBI…….....…….APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 80 of 2011 by Hon. S.K. Mutai, R.M on 8/6/2011)

JUDGMENT

1. The appellant, **Benjamin Kitonyo Musembi** was charged with the offence of Sexual Assault contrary to **Section 5(1) (a) (1)** as read with **Section 5(2)** of the **Sexual Offences Act No. 3** of **2006.** Particular thereof being that on the **25th** day of **March, 2011** at around **5.00pm** at **[Particulars Withheld],** within **Kitui County** unlawfully penetrated his genital organ in to the anus of **N L** a child aged 3 years.
2. In alternative he was charged with the offence of committing an Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act.** Particulars thereof being that on the **25th** day of **March, 2011** at around **5.00pm** at **[Particulars Withheld],** within **Kitui County** committed an act of indecency with **N L** a child aged 3 years by penetrating his genital organ into his anus.
3. Having denied the charges the matter was heard. He was convicted on both counts and sentenced to serve fifteen (15) years imprisonment.
4. Being aggrieved by the conviction and sentence thereof he appealed on the ground that the learned trial magistrate erred in law and fact by:-

i. Convicting him on both the main and alternative charges;
ii. Failing to observe that he was not identified as the person who defiled the complainant;
iii. Misdirecting himself by reaching a finding that the offence was proved though the *alibi* defence was self-explanatory.

5. At the hearing of the appeal the appellant relied upon written submissions. He emphasized what was raised in his grounds of appeal.
6. **Mrs Gakobo,** Senior Principal State Counsel for the State opposed the appeal. She submitted that the complainant a child aged three (3) years had been left under the care of the appellant. In the evening his mother returned home to find him bleeding from the anus. Circumstantial evidence adduced pointed to the appellant as the person who penetrated the child. She called upon the court

to correct the error occasioned by the trial court of convicting on both counts and uphold the sentence meted out.

7. This being the first appeal, I do remind myself of the duty to re-consider the evidence, evaluate it and draw my own conclusions in deciding whether the judgment of the trial court should be upheld. (***See Okeno versus Republic [1972] E.A. 32).***
8. The complainant herein was a child aged three (3) years per the assessment of the medical officer who examined him, **Dr. Sarah Kasogo.** (PW4) on examination found the child in pain. He could not sit upright. His anal region was swollen, reddish and tender; she concluded that there was forceful penetration.
9. The complaint being a child of tender age was incapable of consenting to such an act therefore the penetration in the circumstances was unlawful.
10. The issue to be determined is therefore, whether the appellant herein is the one who sexually assaulted the child?
11. In his ground of appeal he argues that the he was not identified by the complainant and the finding reached by the trial magistrate who disregarded his *alibi* defence was a misdirection.
12. In his defence the appellant stated that he could not have committed the offence because on the fateful date he was on duty herding animals for his employer at **Mbitini** until 3.00pm. Thereafter he went back to E**nzou** where he stayed then returned home. He was arrested at 8.00pm. In her evidence PW1, **S K A** left the complainant under the care of her young sister. She returned home in the evening to find him having been sexually assaulted.
13. PW2, **M M B** was asleep at 5.00pm when she was called out by someone. When she went out she found that it was the appellant who had called her. She saw him ran away. She found the complainant who was bleeding from the anus. He had no pair of shorts.
14. PW3, **A K** was notified of what had befallen the child and he acted by reporting the matter to the police and he also took him to hospital for treatment.
15. None of the witnesses saw the appellant in the act of penetrating the child. In reaching his findings the learned trial magistrate stated that the appellant was positively identified by PW1, PW2 and PW3 as the person who sexually assaulted the child on the anal region. Further, he stated that the appellant failed to challenge the prosecution case.
16. The duty was not upon the appellant to challenge the prosecution's case. The prosecution had a duty of proving that the heinous act was committed by the appellant.
17. The evidence adduced against the appellant was of a single witness and circumstantial in nature. In order for the court to act on such evidence it was required to satisfy itself that there was a strong inference to connect the appellant to the offence such that there was no doubt in having him acquitted. In the case of ***Abanga alias Onyango versus Republic Criminal Appeal No. 32 of 1990,*** the Court of Appeal considered the principles to be applied in order to test circumstantial evidence. It remarked;

> "***It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;-***

i. ***The circumstances from which an inference of guilty is sought to be drawn , must be cogently and firmly established;***
ii. ***Those circumstances should be of a definite tendency unerringly pointing towards guilty of the accused;***
iii. ***The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else".***

18. The only circumstances stated to have existed in this case connecting the appellant to the offence is the evidence adduced by PW2 that she was called out while asleep. She went out to find the child and the appellant was running away. This was a suggestion that the appellant sexually assaulted the child and carried him to PW2's home then called her out and ran away. This being evidence was of a single witness. The court had a duty of cautioning itself prior to relying on such evidence to convict the appellant.
19. The court was also required to interrogate circumstances under which the child left PW1's sister's

custody. She was entrusted with the duty of taking care of the child. This is a disconnect of evidence adduced. If indeed the appellant was seen running away, evidence should have been adduced that he was the one who took away the child from PW1's sister and later took him to PW2's home. What was also not established was the distance between the points where the child was and where the appellant was. PW2 stated;-

> "***I saw him ran away when I went outside"***
>
> Did she see his backside or the front side? What made her believe it was indeed the appellant?

20. In his alibi defence he simply denied having been seen at the scene. In the case of ***Uganda versus Sebyala and Others [1969] E.A. 204*** it was observed:-

> "***The accused does not have to establish that his alibi is reasonably true. All he has to do is to create a doubt as to the strength of the case for the prosecution When the prosecution case is thin an alibi which is particularly strong may very well raise doubts"***

21. The appellant having not been found in the act of penetrating the child or even holding the child– assuming that he is the one who had taken the child to the home of PW2 would be a mere assumption that does not prove the case beyond reasonable doubt. Some doubt is indeed created which would have called upon the court to consider reaching a contrary view.
22. With regard to the first ground of appeal, it was erroneous on the part of the trial magistrate to convict on both the main and alternative charge.
23. From the foregoing the appeal is meritorious. It succeeds. I therefore quash the conviction and set aside the sentence meted out.
24. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of OCTOBER, 2014.

L.N. MUTENDE

JUDGE