REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.173 OF 2010

BETWEEN

CHARLES KAIMENYI MAGIRI ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal Case No.810 of 2008

in Nanyuki SPM's court dated 11th June, 2010 – Hon. E.N. Gichangi, RM)

JUDGMENT

1. The appellant CHARLES KAIMENYI MAGIRI was charged with the offence of attempted defilement contrary to **Section 9 (1)** of the **Sexual Offences Act No.3 of 2006**, the particulars of which were that on the 5th day of April 2008 in Laikipia District of the Rift Valley Province attempted to penetrate F.K. who was a child aged five years.

2. He faced an alternative charge of Indecent Act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No.3 of 2006**, the particulars of which were that on the 5th day of April 2008 in Laikipia District of the Rift Valley Province did indecent act with F.K. who is a child aged 5 years by touching her private part namely vagina.

3. He pleaded not guilty, was tried, convicted and sentenced to ten years on the alternative charge. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following grounds in his home grown grounds of appeal:-

a) H*e was convicted on a single identification witness without corroboration.*

b) His rights under **Section 72 (3) (b)** *of the then* **Constitution** *were violated.*

c) There was no evidence to sustain the charge.

d) His defence was not taken into account.

4. When the appeal came up for hearing before me, the appellant who was not represented filed further memorandum of appeal together with written submission which he relied upon to wit:-

a) The prosecution evidence was full of doubt and inconsistencies.

b) No evidence was tendered on his arrest and the charge was not proved beyond reasonable doubt.

c) His defence was not taken into account and the trial court shifted the burden of proof upon him.

5. Mr. Nyamache appeared for the State and opposed the appeal and submitted that no particular number of witnesses is required to prove the prosecution's case under **Section 134** of the **Evidence Act**. It was submitted that the case was in respect of Sexual Offence involving a minor and the evidence of a single identifying witness was enough. It was submitted that the alternative charge was proved by the evidence of PW1, PW2 and PW4.

6. On behalf of the appellant, it was submitted that he was convicted on the evidence of three key prosecution witnesses that is PW1, PW2 and PW3 but that the trial court did not properly evaluate the said evidence. It was submitted that PW4's evidence was hearsay.

7. It was further submitted that the manner of his arrest was not clear. It was submitted that the charges were not proved to the required standard and that the trial court acted only on assumption. He further submitted that his defence was never challenged and had the trial court intrinsically examine his defence in light of the prosecution's case he ought to have found both PW1, PW2 and PW4 to had been hostile witnesses.

8. It was submitted that the trial court shifted the burden of proof upon the appeal contrary to law and on the authority of **Stephen Mungai Machari -vs- R.- Criminal Appeal No.1 of 1994** where it was held that:-

"An accused person is under no obligation to prove his own innocence since the burden of proving a case against the evidence remains in the prosecution throughout."

9. He submitted that his appeal be allowed.

10. This being a first appeal, the court is required to reassess the evidence tendered before the trial court and to come to its own decision thereon though taking into account the fact that it did not have the advantage of seeing and hearing witnesses.

11. The prosecution case was that PW1 a minor aged 6 years was called by the appellant who is their neighbour on 5th April 2008 at 3.00 p.m. while her mother was away and told her to follow him. They went to the bush where he told her to remove her clothes and made her to lie down. He removed his clothes and defiled her. He thereafter told her not to tell anybody else. When she got home she told her mother who took her to the police and to the hospital.

12. PW2 N.G.M. stated on oath that PW1 was his younger sister and on the material day he was at home taking care of her since their mother was away when the appellant came for a visit. He then saw PW1 following the appellant. He then decided to go help his younger brother who was grazing and saw the appellant and PW1 come from behind the kitchen and the appellant walking home while PW1 was crying. She then told him that the appellant had removed her clothes and showed him her private parts which were bleeding. He then told her to go home and report. He later on told his mother what had happened and PW1 was taken to hospital.

13. PW3 George Onserio Mochama, clinical officer who examined the complainant testified that she had no laceration or bruises, her hymen was intact, with no visible discharge from her vagina. No blood or spermatozoa were seen. He formed opinion that there was no evidence of forceful penetration or ejaculation.

14. PW4 Damaris Gacheri Mbogori the complainant's mother testified on oath that when she got home at

6.00 p.m. when PW1 saw her she was fearful. The other kids urged her to tell her what had happened and she said that the appellant had defiled her down the river and when she checked her clothes they had been put inside out. The complainant was then taken to hospital and the appellant arrested by PW5 on an allegation that he wanted to run away. When he arrested him he had been surrounded by members of the public.

15. When put on his defence, the appellant gave unsworn statement and stated he was a carpenter. On 6th April 2007 he was at home and went to look for work upto 3.00 p.m. His dad came and told him that the mother of PW1 had said that he had raped PW1. The police thereafter came and arrested him.

16. In convicting the appellant the trial court had this to say:-

> **"The accused did not offer an explanation regarding this 5/4/2007 when the incident is alleged to have taken place. PW1 stated that the accused person put his urinating thing in her urinating thing and she felt pain. PW2 talked of PW1 bleeding from her private parts. PW4 talked of seeing clothes put inside out but never mentioned blood. I believe if she saw any blood on the clothes of PW1, she would have said it. She only saw a problem in the way clothes had been put. The clinical officer saw no blood, no spermatozoa on PW1 no bruises or forceful entry …..**
>
> **The second question is whether the accused committed an indecent act with a child. PW1 stated that the accused told her to remove her clothes which she did. The accused then removed his trouser and lied on her …..**
>
> **PW2 stated that he saw the accused and DW1 emerging from behind the kitchen. Earlier he had seen PW1 leave with the accused...**
>
> **The accused on the other hand never offered any explanation of this day but narrated how he was arrested."**

17. From the analysis of the judgment it is clear that the trial court fell into error by requiring the appellant to offer an explanation of where he was on 5th April 2008. It was not the duty of the appellant to offer any explanation at all since it was the duty of the prosecution to prove their case beyond reasonable doubt. It is therefore clear that the appellant was pre prejudiced.

18. The prosecution case against the appellant was also full of doubts the benefits of which should have been given to the appellant. It was PW1's evidence that she went with the appellant to the bush while PW2 stated that he saw the appellant and PW1 come from behind the kitchen while under cross examination he stated that PW1 told him that she was from the appellant's place. It was PW4's evidence that she had been told that the defilement took place around the river.

19. It was also PW2's evidence that he had seen blood from the private parts of PW1 which evidence was never confirmed by PW4 and PW3 and therefore whereas the appellant was convicted for the alternative charge of indecent act with a child, the fact that PW4 found the clothes of PW1 wrongly put did not mean that the same were hurriedly put by PW1. There was no evidence to support the trial court's finding on the same. There was no evidence tendered by the prosecution to support the alternative charge.

20. The prosecution case against the appellant was therefore not proved beyond reasonable doubt and therefore his conviction and sentence was not safe. I would therefore allow the appeal herein, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Signed and dated .....day of 2014

J. WAKIAGA

JUDGE

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

J. NGAAH

JUDGE.

In the presence of:-

---------- for Appellant

---------- for Respondent