



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Criminal Appeal 141 of 2011**

**JAMES PETER EKAI ::: APPELLANT.**

**VERSUS**

**REPUBLIC ::: RESPONDENT.**

*(Being an appeal from the original conviction and sentence of T. Nzioki – SRM. in Criminal Case No. 535 of 2010 delivered on 23rd August, 2011 at Lodwar.)*

**J U D G M E N T.**

The appellant, **James Peter Ekai**, was charged with defilement contrary to section 8 (1) read with section 8 (2) of the Sexual Offences Act and alternatively, with indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. It was alleged that on the 31st July, 2010, at Kakuma Refugee Camp, the appellant defiled MA, a girl aged two (2) years or engaged in an indecent act with the said girl by touching her genital organ.

The appellant denied the charges but was convicted on the main count after full trial and sentenced to thirty (30) years imprisonment. He was dissatisfied with the conviction and sentence and preferred the present appeal on the basis of the grounds in his petition of appeal filed herein on 21st October, 2011. His complaint is mainly that his prosecution was actuated by malice and a conspiracy between the parents of the complainant (i.e PW1 & 2) and the doctor who examined her.

The appellant also complains that he was convicted on the basis of a doctor's report which was not conclusive and besides, PW1 and PW2 did not witness the alleged act. He represented himself in this appeal and put reliance on his written submissions.

The learned prosecution counsel, **Mr. Chelashaw**, conceded the appeal on behalf of the Republic saying that the evidence on record was circumstantial and was insufficient in linking the appellant to the offence. Further, the appellant was convicted on mere suspicion which was not strong enough.

Having considered the submissions by both sides, it now becomes the role of this court to consider the evidence afresh and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing witnesses.

Briefly, the prosecution case was that on the material date, the parents of the child victim (complainant) had left her at home with another of their child and the appellant who was their employee but upon their return, they heard the complainant screaming. They examined her and found blood on her legs. They rushed her to hospital and were advised to report to the police.

At the police station they **(PW1 and PW2)** were given a P3 form which was completed and signed by Dr. Moses Musawa (PW3).

Thereafter, the matter was investigated by **P.C. Gene Aila (PW4)**, based at Kakuma police station., he later preferred the present charges against the appellant. The appellant's defence was a denial and a contention that he was implicated by the parents of the child after they disagreed over payment of his salary arrears amounting to Ksh. 10,000/=.

In convicting the appellant, the learned trial magistrate disbelieved the appellants defence and was convinced beyond reasonable doubt that the appellant took advantage of the tender age of the child and penetrated her genital organ while the parents were away.

In essence, the learned trial magistrate convicted the appellant on the basis of suspicion and circumstantial evidence.

In the opinion of this court, the circumstantial evidence was not cogent and could not prove beyond reasonable doubt that it was the appellant who must have offended the child complainant to the exclusion of any other person. It must be noted that there was no eye witness to the alleged offence. There was also no conclusive medical evidence to prove that the child was defiled although it indicated that she may have been sexually molested in another manner. Whatever the case, there was lack of substantial evidence to link the appellant with the offence. Indeed, suspicion existed by virtue of the fact that the only adult left with the child at home was the appellant. But, such suspicion was not strong enough especially considering that there was no evidence of defilement of the child only that she had blood stains in the vagina without indication that she was penetrated by a male sexual organ.

Could be the child was never sexually molested at all by any person but injured herself.

Be that as it may, suspicion alone no matter how strong cannot be sufficient evidence for commission of an offence. There must be other evidence to confirm any suspicion. Herein, such other evidence was lacking.

Therefore, this court agrees with the Republic that the prosecution evidence against the appellant was insufficient to sustain a conviction.

Consequently, the appellant's conviction by the learned trial magistrate was not only improper but also unsafe. The same is hereby quashed. The sentence imposed against the appellant is hereby set aside with the result that he shall be released forthwith unless otherwise lawfully held.

**[Delivered and signed this 14th day of May, 2013.]**

**J.R. KARANJA.**  
**JUDGE.**