REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 116 OF 2011

THOMAS ALUGHA NDEGWA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 3307 of 2010 in the Chief Magistrate's Court at Thika – Mrs. L. M. Wachira (SRM) on 28th April 2011)

JUDGMENT

1. **Thomas Alugha Ndegwa,** the appellant herein was tried in count I for the offence of defilement of a girl contrary to **Section 8(1)** read together with **sub-section (2)** of the **Sexual Offences Act No. 3 of 2006**. It was alleged that on the 3rd day of July 2010 at Ruera Estate of Ruiru District within Central Province he unlawfully committed an act which caused penetration with I.N. a girl of 5½ years. (The initials I.N. have been used in place of her names to protect the identity of the minor.) In the alternative he faced a charge of indecent act with the said I. N. contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006**, for allegedly, unlawfully touching her genital organs.

2. In **count II** he was tried for the offence of attempted defilement contrary to **Section 9(1)** read together with **sub-section (2)** of the **Sexual Offence Act No. 3 of 2006**. It was alleged that on 20th day of July 2010 at Ruera Estate of Ruiru District within Central Province he unlawfully attempted to cause his genital organ to penetrate into the genital organs of L.A., a child aged 3 years and eight months. (The initials L.A. have been used in place of her names to protect the identity of the minor.) In the alternative he faced a charge of indecent act with the said L. A. contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006** for allegedly, unlawfully touching her genital organs.

3. He was convicted in count I and sentenced to life imprisonment, while he was acquitted in count II.

4. On appeal the appellant contended that the conviction and sentence were defective since they were based on **Section 8(1)(2)** of the **Sexual Offences Act** which does not exist; that both **Article 49** and **Article 50** of the New Constitution, and **Section 72** through to **Section 84** of the repealed Constitution were violated; that evidence was fabricated, contradictory, inconsistent, uncorroborated and inconclusive; that the case was not proved beyond reasonable doubt, and that vital witnesses were not availed.

5. The state opposed the appeal through the learned state counsel Miss Njuguna, who submitted that the charges were not defective and had not been brought in contravention of any of the cited provisions of the law. Since the appellant was charged and convicted for the offence of defilement contrary to **Section 8(1) and (2)** of the **Sexual Offence Act** which are existing provisions of the law. She contended that if indeed there was infringement of the appellant's rights, the appellant's redress lay elsewhere and not in an acquittal in this case.

6. On the ground that the evidence was inconsistent and uncorroborated and that the case was not proved beyond reasonable doubt, the learned state counsel urged that the evidence was consistent and that the witnesses gave an account of what happened on the material day. She further argued that the evidence of the witness was corroborated by the doctor, and that it was not necessary to produce the Kshs.5 in evidence to prove the case since the P3 was produced. The learned counsel also submitted that the requisite witnesses testified and, in any case, under **Section 124 Evidence Act** the evidence of a minor was sufficient to form a basis for a conviction.

7. This being the first appeal from a conviction by the magistrate's court, the appellant is entitled to have this appellate court's own consideration and views on the evidence as a whole, and its own decision thereon (see **Njoroge v Republic [1989] KLR pg 313**).

8. On the question of the defect in the charge sheet for indicating that the appellant was charged under **Section 8(1)(2)** of the **Sexual Offences Act,** it is a fact that no such section exists in the **Sexual Offences Act**. **Section 8(1)** of the **Sexual Offences** which provides that:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."**

defines what act constitutes the offence termed defilement. **Section 8(2)** of the **Sexual Offences** on the other hand provides the punishment since the complainant herein was aged 5½ years. The two sections are read together to form the charge.

9. For some inexplicable reason however, the prosecution seem to be finding it increasingly tedious to insert the words **"read together with"** which would indicate as it should, that these are two different sections of the law but which are to be read together. The correct reading of the charge therefore should be:

> **"Defilement of a child contrary to section 8(1) read together with Section 8(2)** of the **Sexual Offences Act No. 3 of 2006.**"

The omission however, although depicting slovenliness on the part of the prosecution cannot be said to have prejudiced the appellant. The offence with which he was faced, the particulars thereof, and the punishment in the event of conviction were clear.

10. On the issue of violation of constitutional rights, **Article 49** of the Constitution provides for the rights of arrested persons, while **Article 50** thereof provides for the right to fair hearing. It has not been demonstrated in what manner the appellant's rights were infringed except for the allegation of late arraignment in court after he was arrested. If indeed there was delay in producing him before court and his rights were infringed in that manner, I respectively agree that the appellants had redress elsewhere under **Section 72(6)** of the repealed **Constitution**. From the evidence there is no explanation tendered by the prosecution, as to the reasons for the delay in taking the appellant to court.

11. In the case of **JULIUS KAMAU MBUGUA VS REPUBLIC CR. APPEAL No. 50 OF 2008**, the Court of Appeal reviewed a wide range of previous decisions on the issue of remedies available to accused persons who are taken to court later than provided for. The court rendered itself in the following manner:

"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in *Section 72 (6).* ***That is the appropriate remedy which the appellant should have sought in a different forum."***

12. The appellant in his unsworn testimony denied the offence and testified that the complainant's mother was his friend with whom they had disagreed, and that she had promised to do something serious to him. Hence a week later on 5th August 2010 he was arrested when he returned home from work.

13. An analysis of the evidence shows that the appellant and the minor were well known to each other as neighbours for a considerable length of time. There was no evidence of a pre-existing grudge between the two families, except for the belated assertion of the appellant in his defence. He did not put the issue of the alleged bad blood between himself and **PW1** to her by way of cross-examination. It is therefore my humble view that this is an afterthought meant only to exculpate him.

14. The prosecution's case turns on the evidence of **PW2** the 5½ year old complainant on the question of identification. There was no dispute that the minor had been defiled. Her evidence was corroborated by that of **PW1** her mother who, upon receiving the report from the minor examined her genitals and observed some discharge therein. There was also corroboration from **PW3**, Joan Munene a Clinical Officer at Ruiru sub district hospital. She testified that on examination of the minor on 2nd August 2010, she noted that there were no tears on the clothes that she wore but that the child's hymen had been broken and the intoroitus was hyperaemic, although the minor was in good health. It was her finding that there had been actual penetration. The minor had been defiled.

15. The minor was subjected to **Voire dire** examination and found to understand the duty of telling the truth although she was of very tender age. Her evidence was taken on oath. I note from the record that she gave a detailed analysis of what transpired which could not have been expected to come from memory if the 5½ year old minor had been coached.

16. **PWI** the mother to the complainant testified that on 31st July 2011 at 7.00 p.m. she returned home from work. The complainant informed her that "Baba Joy had done bad manners" to her, and given her some money thereafter. The child reported that he had done the **"bad manners"** to her on a bed on four other occasions. The mother reported the matter to the police and also took the child to Ruiru hospital.

17. **PW2** the minor testified that on 31st July 2010 at 1.pm. she was playing within the compound where they lived when the appellant who lives within the same compound called her into his house. The appellant directed her to remove her pants and lie on the bed, and the minor complied. She further testified that the appellant removed his trouser and removed something the child called "Munyunyu". To demonstrate what "Munyunyu" was, she pointed to her genital area and told the court that "Munyunyu" was something found in that area but only in boys. The appellant inserted the said "Munyunyu" into her private parts and that she felt pain. He then gave her Kshs.5/= which she later lost. On the previous occasions she had not reported to anyone, because the appellant told her not to. She explained that he usually locked the door and caused her to lie on her back on the bed as he lay on her, and that he usually had no trousers at such times.

18. After a careful re-assessment, of the evidence on record, I am in agreement with the findings of the trial court, and I am satisfied that the conviction entered against the appellant was based on sound evidence. I therefore find that the appeal is unmerited. I uphold the conviction entered and sentence imposed by the learned trial magistrate.

The appeal is hereby dismissed.

SIGNED DATED and **DELIVERED** in open court this ***13th*** **day** of ***June*** **2013**

L. A. ACHODE

JUDGE