REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

H.C. CRIMINAL APPEAL NO.185 OF 2011

(An Appeal arising out of the conviction & sentence of F. KYAMBIA –SRM delivered on 18th October 2011 in Bungoma CMC.CR.C. No.511 of 2011)

ROBERT KHAMALA NYONGESA……..
APPELLANT

VERSUS

REPUBLIC…….……..…….....
RESPONDENT

J U D G M E N T

The Appellant, Robert Khamala Nyongesa, was charged with the offence of **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 16th March 2010 at Khalaba Sub-location of Bungoma South District, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of C M, a child aged three (3) years. The Appellant was alternatively charged with the offence of causing **an indecent assault** for a child contrary to **Section 11(1)** of the **Sexual Offences Act.** The particulars of the offence were that in the same place and on the same date, the Appellant unlawfully and intentionally caused his penis to come into contact with the vagina of C M, a child aged three (3) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to both counts. After full trial, he was convicted of the main count of defilement. He sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed this appeal to this court.

In his petition of appeal, the Appellant raised several grounds challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof. The Appellant took issue with the fact that the trial magistrate had relied on the evidence of a three (3) year old child without warning himself of the dangers of relying on such evidence without other evidence to corroborate the evidence. The Appellant faulted the trial magistrate for failing to take into consideration the fact that there was actually no evidence that linked the Appellant to the commission of the crime. He was aggrieved that he had been sentenced to serve an illegal sentence since at the time of the alleged commission of the offence, he was a child within meaning ascribed to the term by the **Children Act**. The Appellant finally faulted the trial magistrate for failing to properly analyze the evidence, particularly his defence, which in his opinion, exonerated him from the crime. For the above reasons, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, this court heard oral submission made by Mr. Makali for the Appellant and by Mr. Ogoti for the State. Whereas Mr. Makali made submission urging the court to allow the appeal on the grounds that the prosecution had failed to establish its case to the required standard of proof, Mr.

Ogoti was of the contrary view. He urged the court to find that the prosecution had established its case on the charge of defilement to the required standard of the law. This court will revert back to the submission made at a later part of this judgment after briefly setting out the facts of this case.

It was the prosecution's case that on 16th March 2010 at about 10.00 a.m., the Appellant defiled the complainant (PW1) C M. The complainant's mother PW2 M M K testified that on the material day, she left the complainant under the care of her sister while she went to work. PW2 is a teacher at ***[particulars withheld]*** Primary School. She recalled that when she returned home at about 5.00 p.m., she noted that the complainant, then a child of three (3) years, was not in her usual jovial mood. She was crying. When she inquired from her sister PW3, R K what the problem was, she was told that the child had complained of suffering from a stomachache. PW2 took no action until about 9.30 p.m. when she removed the clothes of the child to prepare her to go to sleep. It was then that the child told her that she felt pain in her vagina. PW2 inspected the child and saw that her vagina was reddish, was bruised and had some whitish fluid oozing from it. PW2 decided to take the child to the hospital. She made inquiry from the child in regard to who may have caused the injury. The child told her that it was one Robert. PW2 told the court that she knew the Robert that the child was referring to. That Robert was the Appellant who had been employed as a handyman in the compound where she had rented a house. She reported the incident to the police.

PW4 Dr. Isaac Omeri examined the child and filled the P3 form. He told the court that he filled the P3 form on 18th March 2010. The P3 form was partly filled on the basis of a medical report which had been prepared by another doctor who had examined the child on 16th March 2010. PW4 noted that the child had injury on her labia minora and labia majora. The hymen was torn. There was discharge from the vagina. He conducted an HIV test. The test was negative. In his assessment, the child was three (3) years old at the time of the incident. He concluded that indeed the child had been defiled.

PW3 testified that on the material day she was left behind at home to take care of the child. She recalled that about 10.00 a.m. she went to fetch water from a Well within the compound. She stated that she found the Appellant drawing water from the well. She waited until the Appellant had completed the task of drawing water. She testified that the Appellant left her at the Well and went to the house of the landlady with containers of water. She drew water from the well. She returned to the house. On the way she met the complainant carrying her trouser on her head. She was not wearing any undergarment. She decided to bathe the child. The child was complaining of pain in her vagina. PW3 did not examine the vagina. After bathing the child, she dressed her. PW3 recalled that the mood of the child had by that time changed. She was not her usual self and she was not eating well. PW3 was categorical that she did not see the child with the Appellant on that day. She testified that it was the mother of the complainant (PW2) who elicited the information from the complainant regarding to who had touched her vagina. She recalled that it was then that the child disclosed that it was Robert who had touched her.

After the matter was reported to the police, PW5 Cpl Frank Aluda was assigned to investigate case. After concluding his investigations, he reached the conclusion that there was sufficient evidence to have the Appellant charged for defiling the child. PW6 PC Nickson Okwiri rearrested the Appellant after he was taken to the police station at about 11.00 p.m. on 16th March 2010.

When the Appellant was put on his defence, he gave sworn evidence in which he denied committing the offence. While conceding that he was in the same compound where the child was defiled, he testified that on the material day he undertook his duties of slashing grass and fetching water for his employer. He denied the allegation that he had come into contact with the child. He told the court that he worked at the compound until 2.00 p.m. when he left for his home. He was shocked when he was later arrested on the ground that he had defiled the child.

This being a first appeal, it is the duty of this court to reevaluate and to reconsider the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses as they testified and therefore is required to give due allowance in that regard (see **Njoroge –Vs- Republic [1987] KLR 19)**. The issue for determination by this court is whether the

prosecution proved its case on the charge of defilement to the required standard of proof beyond any reasonable doubt.

This court has carefully reevaluated the evidence adduced before the trial court. From the outset, it was clear that the prosecution established to the required standard of proof beyond any reasonable doubt that indeed the complainant was defiled. The evidence of PW4 Dr. Isaac Omeri, a medical officer of health then based at Bungoma District Hospital, left no doubt that the complainant was indeed defiled. He filled a P3 form which showed that the complainant had sustained injuries in her private parts that was consistent to be defiled. There was irrefutable proof that there was penetration. The hymen was broken. There is no doubt that the complainant was defiled on 16th March 2010 when the mother of the complainant noticed the injuries.

The issue for determination by this court is who defiled the complainant. According to the prosecution, it was the Appellant who defiled the complainant. In the submission made before this court, the prosecution stated that it relied on circumstantial evidence to proof that it was the Appellant who defiled the complainant. The nature of the circumstantial evidence was to the effect that it was the Appellant alone and no one else who had access to the complainant at the time the incident took place. In this regard, the prosecution relied on the evidence of PW2, M M K, the mother of the complainant and PW3, R K, the sister of PW2 who was at the time taking care of the complainant. From the testimonies of the two witnesses, it was clear that no one saw the Appellant defile the complainant. In fact, from the testimony of PW3, it was evident that during the material time, the Appellant was within sight of PW3. The Appellant had during the time assisted PW3 to fetch water from a Well within the compound. It was after PW3 had fetched the water that she discovered that the complainant was not in her usual mood. She did not investigate to establish what could have caused her change of mood. She bathed the child. It was only when the mother of the complainant returned in the evening, and as she was preparing the complainant for bed, that she discovered that the complainant had been defiled. From her testimony, it was evident that the Appellant became a suspect on the basis of the information that was supplied to PW2 by the complainant.

The issue for determination by this court is whether the complainant, a child of three (3) years at the time of the incident, was a competent witness to testify in the case. From the proceedings of the trial court, although the trial court conducted *voire dire*, the court misdirected itself when it made a finding that a child of three (3) years was possessed of sufficient knowledge to give evidence. Her testimony before court was an example of incoherence which can only be attributed to the fact that the complainant did not comprehend what she was telling the court. Her testimony clearly pointed the fact that she may have been couched to regurgitate what she was told by her mother. Other than this impeached testimony, there is no evidence that directly connected the Appellant with the defilement of the complainant. In **Mohammed – Vs- Republic (2008)1KLR (G&F) 1175**, the Court of Appeal held that the purpose of conducting *voire dire* is to establish two matters, firstly, whether the child understands the nature of the oath. If the court comes to that conclusion, then it proceeds straight away to swear or affirm the child and to record the evidence. Secondly, if the court is not satisfied on the first test, it should express its opinion, not only that the child is possessed of sufficient intelligence to justify reception of the evidence, but also understands the duty of telling the truth, before proceeding to record the child's evidence. In this appeal, it was obvious that the trial court misdirected itself when it purported to admit the evidence of a child who is not competent to testify before court. A child of three (3) years, cannot, under most circumstances, be said to be possessed of sufficient intelligence to testify before a court of law to establish the existence of any fact. That evidence was therefore wrongly relied on by the trial court to convict the Appellant.

As regard the circumstantial evidence that was adduced by the prosecution, this court is of the view that that evidence was not sufficient to point the guilt of the Appellant as the only person who could have committed the offence. The inculpatory facts in this case were not incompatible with the innocence of the Appellant. The prosecution did not establish the fact that it was only the Appellant who had access of the complainant at the material time. As was held **in Sawe –Vs- Republic [2003] KLR 364 at Page 372**:

> *"In order to justify, on circumstantial evidence, the inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon*

any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."

In the present appeal, it was clear that the only evidence that the prosecution relied on as circumstantial evidence was the fact that the Appellant was working in the compound where the complainant resided at the time the complainant was defiled. No evidence was adduced by the prosecution to exclude the possibility that any other person may have committed the offence during the entire day. It is not clear from the evidence by the prosecution witnesses what particular time of the day the complainant was defiled. She may have been defiled at the time when the Appellant was not in the compound. The Appellant's behaviour during the material day did not point to his guilt. In fact, he was arrested at his home by the police after the report of defilement had been made. In his defence, the Appellant vehemently denied that he had defiled the complainant.

In this court's considered opinion, the evidence adduced by the prosecution witnesses was not sufficient to establish the guilt of the Appellant taking into account the serious nature of the charge that faced the Appellant. The prosecution's case left reasonable doubt that it was the Appellant who defiled the complainant. The appeal is allowed. The conviction of the Appellant is quashed. The sentence imposed upon him is set aside. The Appellant is acquitted of the charge of **defilement** and is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF JULY 2013.

F. GIKONYO

JUDGE