REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 128"B" OF 2010

SAMUEL KANAKE NJAGI ….....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No. 129 OF 2010 at the Chief Magistrate's Court at Embu by Hon. F.W. MACHARIA – SRM on 30/8/2010

J U D G M E N T

SAMUEL KANAKE NJAGI the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(2) of the Sexual Offences Act No.3 of 2006.

The particulars of the offence as stated in the charge sheet were as follows;

> **SAMUEL KANAKE NJAGI:On the 11th day of January 2010, in Embu District within Eastern Province intentionally touched the buttocks and vagina of LK a child aged seven (7) years with his fingers.**

The matter proceeded to full hearing and the Appellant was convicted and sentenced to fifteen (15) years imprisonment. He was aggrieved by the Judgment and filed this appeal citing the following grounds;

1. ***That the Appellant's constitutional rights were violated when he was kept in police custody for more than twenty four (24) hours which is four days.***
2. ***That the Appellant was not supplied with the complainant's statements to enable him adduce more grounds during his defence.***
3. ***That the learned trial Magistrate erred in both points of law and fact by failing to find that the charge sheet was materially defective.***
4. ***That the learned trial Magistrate erred in both points of law and fact by failing to consider the Appellant's defence.***
5. ***That the trial Court findings in the Judgment was not supported by evidence adduced thereof.***
6. ***That the sentence imposed was manifestly harsh and excessive considering the circumstances of the case.***
7. ***That the learned trial Magistrate erred in both points of law and facts by failing to solve the vivid contradictions present in prosecution and yet they touched the core of the case.***

The case of the Prosecution is that on 11/1/2010 at 7.30pm the Appellant who is a neighbour to PW2 was passing on the path near her home when he fell down as he was drunk. PW2 is a grandmother to PW1. PW3 (PW1's mother) asked PW1 to take a torch to the Appellant to assist him see the way. When PW1 took long in coming PW2 and PW3 got concerned. PW3 went to the Appellant's home but did not find him. As they looked for PW1 they finally met her and the Appellant on the way. The Appellant told them he had taken PW1 to the shop to buy a pencil and doughnut. It's PW1 who told PW2 and PW3 how the Appellant had taken her to a coffee plantation and asked her to remove her biker. He inserted his two fingers in her vagina. The next day PW1 was taken to Embu Provincial General Hospital for examination. Doctor Shella Moraa (PW4) who examined PW1 did not find anything abnormal on her. But she was treated just incase any fluids were passed over (EXB1). The Appellant in his sworn defence denied the charges. He said he was drunk and slept on the path way on his way home. PW2 sent her granddaughter (PW1) with a torch to assist him. They went to his home then to the shop and to PW2's home. PW2 was not happy and wanted PW1 to tell them where she had been. He was later arrested.

When the appeal came for hearing the learned State Counsel submitted that she was conceding to the appeal because the victim's age was not established by the Prosecution and this was fatal to the Prosecution case. She asked for an order for a retrial. This is what section 11(1) Sexual Offences Act states;

> ***"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten (10) years".***

All that is required is for the Court to be satisfied that the victim is a child. This provision is not specific about the age. PW1 was said to be a child aged seven (7) years. The learned trial Magistrate was satisfied that this was a child of tender years i.e. below ten years. She as is required conducted a *voire dire* examination for her before she could record any evidence from her. To my mind since the Court found it fit to conduct the said examination and the section under which the Appellant was charged is not specific about years the said omission of establishment of her real age was not fatal. Her mother (PW3) also told the Court the child was aged seven (7) years. The P3 also confirms that. My finding is that PW1 was confirmed to be a child for the purposes of section 11(1) of the Sexual Offences Act No.3 of 2006.

I have considered the submissions by the Appellant and the grounds of appeal. I have equally reevaluated the evidence on record as is expected of a first appeal Court as was stated in the case of ***KIILU –V- REPUBLIC [2005]1 KLR 174*** as follows;

1. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh convicting evidence and draw its own conclusions.***
2. ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

There is no dispute that indeed PW1 was sent by PW2/PW3 with a torch to assist their drunk neighbour – (the Appellant) to trace his path. Even the Appellant confirms that in his defence. What is in dispute is whether in the process the alleged offence was committed.

PW1 says this in her evidence page 7 lines 8-11

> ***"He inserted his two fingers in my vagina. I saw his fingers because of the light from the torch. He then heard my grandmother making noise. He stopped and he told me to put on the biker. He had removed his trouser. He had put his penis in my vagina***".

Therefore taking what PW1 has stated in her evidence the Appellant actually inserted his two fingers in her vagina. He also did insert his genital organ inside her vagina. PW1 was the only witness to this.

PW1 was taken to hospital the next day. She was examined. This was the finding;

> ***"General condition was normal and she was calm. The Labia Majora and Minora were normal. There were no tears at the vagina nor laceration. The hymen was intact and the cervix was okay. No vaginal discharge noted. All other systems were normal. Approximate age of injury was hours. The conclusion was that there was no penetration".***

This is quite contrary to the evidence of PW1 and what she told PW2 and PW3.

The particulars in the charge sheet are that the Appellant intentionally touched the buttocks and vagina of PW1. Was this kind of evidence adduced before the Court?

In cross examination at page 17, PW2 told the Court that she told PW3 to follow PW1 because the Appellant had a bad reputation. Why had PW2 and PW3 sent this child to assist the Appellant if they knew he had a bad reputation? PW2 and PW3 who were adults should have gone to assist him, as their neighbour. The credibility of this evidence is in doubt. In the case of ***KIILU & ANOTHER –VS- REPUBLIC [2005]1 KLR 174*** the Court of Appeal held thus:

> ***"The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful interiority and therefore an unreliable witness which makes it unsafe to accept his evidence".***

Was the report given by PW1 to PW2 and PW3 credible in the light of the medical report?. I am not convinced that it is credible. Since her evidence was the basis of this complainant I find the same not established. I allow the appeal and quash the conviction. The sentence is set aside. The Appellant shall be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 8TH DAY OF AUGUST 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

Ingahizu for State

Appellant

Kirong – C/c