REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 240 OF 2012

MICHEAL KABOGO NG'ANG'A…………...........……….. APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From original conviction and sentence in criminal case Number 109 of 2011 in the Principal Magistrate's Court at Gatundu – D. G. Karani (PM) on 16/5/2012

JUDGMENT

1. The Appellant, **Michael Kabogo Ng'ang'a** was charged with the offence of defilement of a girl contrary to **Section 8(2)** as read with **sub-section 2** of the **Sexual Offences Act**. At the close of the trial, the appellant was convicted on the alternative charge of indecent act with a child contrary to section **11(1)** of the **Sexual Offences Act** and sentenced to serve 10 years imprisonment.

2. The particulars of the charge were that on the 13th day of February 2011, at [particulars withheld] village in Gatundu North District within Kiambu, he intentionally and unlawfully committed an act that caused penetration with C. M. G, (initials used to protect the minor's identity) a girl of 10 years.
3. The appellant averred in his grounds of appeal that the prosecution's case was not proved against him beyond reasonable doubt, and that his defence statement was not properly considered. Miss Nyaucho, the learned state counsel on her part opposed the appeal, on behalf of the respondent, for reasons that the prosecution proved their case to the required standard, and the appellant was satisfactorily identified.

4. Sitting as the first appellate court I have reconsidered and re-evaluated the evidence to make my own findings and draw my own conclusions. In so doing I have made allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses which I did not have. **(see Ngunu v Republic [1984]KLR 729).**

5. The questions for determination are whether the minor was indecently assaulted as determined by the learned trial magistrate, and if so, whether there was sufficient evidence to link the appellant to the offence.

6. Before receiving C.M.G's evidence, who because of her age, appeared to be a child of tender years, the magistrate did inquire whether she understood the nature of an oath, and whether she was possessed of sufficient intelligence to justify the reception of her evidence **(section 19(1)**

Oaths and **Statutory Declarations Act, (Cap 15).** The only reason for not receiving her evidence on oath was that she was hesitant in responding to questions during the voire dire examination.

7. **PW1** a ten year old minor, told the court that the appellant found her picking strawberries on her way to the shop and pulled her into a shamba, where he undressed her, pulled down his trousers up to the knee level, made her lie on her back, pulled her legs apart and inserted his penis into her vagina.

8. In his unsworn defence the appellant advanced an alibi defence in which he told the court that he returned home on 13th February 2011 at 3.30 p.m. from his job as a matatu conductor. At about 5.00 p.m. three men who included one Mr. Mburu came to his home. The said Mburu had previously stolen from the appellant's uncle and promised to revenge. The three men set upon him and beat him and escorted him to the police post, the hospital and to Gatundu police station where he was locked up and charged. His mother testified as **DW2** in his support.

9. The appellant denied knowing either the complainant or **PW4**, or seeing either of them at the scene of his arrest. He denied the offence altogether and averred that he had been framed.

10. On the question as to whether the minor was indecently assaulted, she told the court that the appellant had inserted his finger in her vagina before he penetrated her using his penis. She said that she felt pain but did not bleed, and that it was the first time for her to have sexual intercourse. The treatment notes from Igegania Sub-District Hospital where she was taken on the same day show that the minor had some little discharge on her virginal opening, and some soil on the perianal area. Her hymen was broken but there was no bleeding. The impression formed was that she had been **"raped"**.

11. For the foregoing reasons, the medical personnel who attended to the minor at Igegania sub District hospital on the 13th February 2011, which was the date of the offence, formed an impression that she had been **"raped"**, (defiled) as is evinced from the general out patient record produced in evidence. It is baffling that Dr. Ngugi who filled the P3 form in her behalf four months later on 15th June 2011, noted all these but noted as follows:

> **"Evidence of sexual assault in conclusive**
>
> **except for broken hymen."**

12. The offence of defilement is complete upon penetration of the male sexual organ in to the female sexual organ. **Section 8(1)** of the **Sexual Offences Act No. 3 of 2006** defines defilement as hereunder:

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

The act of penetration is defined on **Section 2(1) (d)** of the said Act to mean:

"The partial or complete insertion of the genital organs of a person into the genital organs of another person."

13. There is therefore, no legal requirement that there be bleeding on the part of the victim or emission of seed on the part of the male, for there to be proof of defilement or rape. I am however in agreement with the learned trial magistrate in her observation that the torn hymen perse is not proof of defilement, as it could indeed be caused by any other misadventure.

14. On the alternative count of indecent act with a female contrary to **section 11(1)** of the **Sexual Offences Act**, the **Sexual Offences Act**, at **section 2(1)(a)** defines an **"Indecent act"** as any

unlawful intentional act which causes any contract between any part of the body of a person with the genital organs breast or buttocks of another person.

15. In this case, **PW1** told the court that the appellant first inserted his finger into her vagina then made his penis touch her vagina. This falls within the meaning of an indecent act for reasons that he unlawfully and intentionally caused his finger and his genital organ namely penis, to come into contact with the minor's genital organ.

16. On identification the evidence on record indicates that the offence occurred at about 5.00 p.m, in broad day light. The minor testified that there was no one about when the appellant accosted her, and there is no evidence that the minor was blind folded nor that her assailant attempted to camouflage himself in any way. Although the minor does not appear to have known the assailant before the attack, the circumstances were such that there was no interference with her observation of the person who was assaulting her.

17. To lend credence to the minor's evidence on identification there was the circumstantial of evidence **PW4** Mr. Kamau, who heard hurried footsteps coming from the maize field and went to check what was happening. He testified that he saw the appellant emerge from the maize field and a moment later he also saw **PW1** emerge from the maize field with her fly still open at the same spot where the appellant had just emerged from.

18. **PW4**, escorted **PW1** home from the scene and immediately told **PW2** whom he found at home to ask **PW1** what she was doing in the maize field with the appellant. **PW4** mentioned the appellant by name to **PW2** and that is how his identity came to be known. The evidence of **PW4** as to the identity of the appellant was that of recognition and the learned trial magistrate had no problem in accepting it. I too accept it and find that it corroborates that of **PW1**, and places the appellant at the scene and at the same time with **PW1**. In any case the testimony of a victim of sexual assault on its own is sufficient to found a conviction, so long as the reasons for believing such testimony are recorded in the judgment.

19. There is no evidence of the existence of animosity between the two families or any reason to believe that the appellant was framed. In my humble opinion, I am satisfied therefore, that the alternative count was proved against the appellant beyond a shadow of doubt, and his conviction on the charge of indecent act with a female contrary to **section 11(1)** of the **Sexual Offences Act** was properly founded on sound evidence. The sentence of ten years imposed on the appellant by the learned trial magistrate is the mandatory minimum sentence that the court could impose upon conviction.

Reasons wherefore this appeal must fail, and is accordingly dismissed.

SIGNED DATED and DELIVERED in open court this 18th day of September 2013.

L. A. ACHODE

JUDGE