**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 164 OF 2011**

**BETWEEN**

**RICHARD NJIRU KORU .....…..…..……..... APPELLANT**

**AND**

**REPUBLIC …….....…….. RESPONDENT**

***(Being an appeal from the original conviction and sentence in Runyenjes Criminal Case 328 of 2011 by M.W. Mutuku S.R.M on 7th September, 2011)***

**JUDGMENT**

1. Although the appellant was charged with the offence of defilement contrary to **section 8(3)** of the ***Sexual Offences Act***, he was acquitted but convicted of alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act***. He was sentenced to 10 years imprisonment.

2. The appellant complains that the learned magistrate erred in law and in fact when she failed to consider that he was initially charged with defilement and that the offence could not be proved when the medical tests turned out negative. Although the main charge was not proved, the learned magistrate was entitled to convict the appellant on the alternative charge. The Court of Appeal in ***M.B.O v Republic,*** **Nakuru Criminal Case 342 of 2008 [2010] *e*KLR** stated as follows regarding alternative charges, *"The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charges once there is ample evidence to support the main charge. If the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into thin air! It may be examined to see if it supports a minor and cognate offence and if it does prove such offence beyond doubt, a conviction will follow. Many a times only the main charge in offences such as Murder, Robbery or Rape, for example, will appear on record. But it cannot be argued that if the evidence establishes minor and cognate offences such as manslaughter, theft or indecent assault respectively, the court cannot convict for those offences on the ground that they were not charged. So too with defilement. Indecent assault is a minor and cognate offence and was for consideration if the main charge was unsustainable.* ***Section 179*** *of the Criminal Procedure Code allows for such procedure."*

3. Nevertheless as this is the first appeal, the court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld (***Okeno v Republic*** **[1972] EA 32**). The court has to bear in mind that it neither saw nor

heard the witness and should be slow to depart from the lower court's findings on credibility and demeanor.

4. The particulars of the alternative charge were that on 29th May 2011, the appellant unlawfully and intentionally touched private parts of RK a girl aged between 12 and 15 years.

5. PW 1, the complainant, testified that she was aged 13 years and that the appellant was a person known her as he was a neighbour. PW 1 gave clear and convincing evidence that she was escorting her friend and as she passed the appellant's home, she met him. He grabbed her by the neck but she put up a spirited fight while screaming. He forced her to remove her pant with threats to kill her which she did. His attempt to penetrate the complainant's vagina failed. After a while, he let her go. She immediately reported the incident to her mother who informed the village elder, PW 3, who in turn caused the appellant to be arrested.

6. PW 4, Dr Kihumba, who examined PW 1, confirmed that there were no signs of penetration of the genitalia but that examination of the neck revealed tenderness. She also had a hoarse voice. This evidence corroborates that of PW 1 being held by the neck and the fact that she screamed. As there was no penetration, the learned magistrate was correct not to convict the appellant of the main charge.

7. In his unsworn testimony, the appellant stated that the reason he was arrested was that the area elder, PW3 who caused his arrest and his parents had a boundary dispute and that PW3 threatened to arrest him. I agree with the learned magistrate that even if there was a grudge between the appellant and the elder, this had no relation with the child. In light of the prosecution's evidence, his defence could not withstand the clear evidence of the prosecution.

8. A matter of concern is that the age of the complainant was stated in the charge to be ***"between 12 and 15 years".*** During the hearing the only evidence of the age of the child was her sworn testimony where she stated she was 13 years. Neither the mother, PW2 nor the investigating officer, PW3 testified to the age of the deceased. I think it is proper to state and prove the specific age of the child in every case under the ***Sexual Offences Act*** but I do not think there is any prejudice occasioned in this case. The learned magistrate found the testimony of the child credible and having conducted a *voir dire* there is no doubt that the complainant was a child.

9. I have evaluated the evidence and I find that the offence of indecent act was duly proved and the learned magistrate was right to convict the appellant. The sentence imposed on the appellant was the minimum provided under the Act and is neither harsh nor excessive.

10. The appellant has also complained that his constitutional rights were violated when he was kept in police custody for more than 24 hours and no explanation given. In light of the decision of the Court of Appeal in ***Julius Kamau Mbugua v Republic*** **Criminal Appeal No. 50 of 2008 [2010]*e* KLR,** the issue of pre-trial arrest does not affect the trial of the appellant and must be taken up in separate proceeding to vindicate that right.

11. The appeal is dismissed.

**DATED, SIGNED and DELIVERED at EMBU this 30th day of October 2013**

**D. S. MAJANJA**

**JUDGE**