REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 41 OF 2012

MICHAEL TOLE …..…..….. APPELLANT

VERSUS

REPUBLIC ……..…….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 651 of 2008 of the Senior Resident Magistrate's Court at Taveta – Hon. C.N. Ndegwa - SRM)

JUDGMENT

MICHAEL TOLE hereinafter referred to as the Appellant was convicted and Sentenced to fifteen (15) years imprisonment for the offence of Sexual assault contrary to section 5(1) of the Sexual offences Act.

The Appellant had been charged with defilement contrary to section 8 (1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006.

The particulars being that on the 8th day of September, 2008 at about 3:00 am at [Particulars withheld] Taveta County he had carnal knowledge of N B a girl under the age of Eleven years.

At page 3 line 23 of his Judgment the trial magisterial observed,

> **"Although PW 1 contended in her evidence that she immediately told her mother (PW 2) on the night of 8th September, 2008. What Accused had told her and what he had done to her, her mother was categorical that PW 1 told her that the Accused had kissed her and inserted his finger into her vagina. PW 1 later said on 9th September, 2008 that the Accused had inserted his penis into her vagina on the previous night in the evening. When she came from school. By that time several hours had passed and she had already taken bath.It is therefore my finding that there is no consistency in the evidence on the allegation that the Accused had inserted his penis int PW 1's Vagina on 8th September, 2008.**
>
> **The evidence is however consistent on the fact that the Accused inserted his finger into the Complainants Vagina on the night of 8th September, 2008".**

Upon that basis the learned trial magistrate proceeded to convict the Accused of the offence of Sexual assault contrary to section 5(1) of the Sexual offences Act.

It is noted that the trial magistrate did indicate in the proceedings that he had carried out a **Voire dire** examination of the child aged ten (10) years and he was satisfied she knew the meaning of an oath.

Apart from indicating so it is not shown how he came to that conclusion by way of brief proceedings to that effect. Be that as it may, at page 4 line 31 PW 1 states,

> **"He kissed me on the mouth, I was wearing a skirt, a shirt and panties. The Accused put his finger in my Vagina. He pushed the finger through the biker and panties. He told me that when I grow up men would tell me to do what he was doing to me.....**
>
> **I told him that I would tell my mother. I called my mother. My mother asked the Accused about the matter. That is when I told my mother what had happened. I left the Accused discussing the matter with my mother and H".**

At page 6 line 12 PW 2 the mother of the Complainant states,

> **" I suspected the Accused had wanted to defile my daughter but he had not succeeded. My daughter did not explain to me properly what the Accused had done. In the morning, my daughter went to school. In the evening she told me she was feeling pain in her Vagina. I asked what had happened and she said that the Accused had inserted his finger into her vagina and later inserted his penis....".**

What I believe the trial magistrate was saying as regards the inconsistency of the evidence before him

is that he believed that the Appellant inserted his finger into complainants vagina but not his penis and therefore decided that a case of defilement had not been proved but that of Sexual assault had been proved.

I do not understand the logic behind that conclusion. If there was no proof that the Accused inserted his penis into complainants vagina when she herself had alleged that the Accused had inserted a finger and his penis into her vagina. Why should he believe that only the finger was inserted?

It is apparent that a doubt had been created into the mind of the trail magistrate as to what was inserted into the complainants vagina. A doubt was created as to whether the complainant did report to her mother of what had transpired that night immediately after the act or the following day in the evening after school.

These are serious doubts which ought to have been resolved in favour of the appellant. The Conviction was not safe. It is quashed accordingly and the Sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **23rd** day of **October, 2013.**

….....

M. MUYA

JUDGE

<u>23RD OCTOBER, 2013</u>

<u>In the presence of:-</u>

Learned State Counsel Miss Ogweno

Appellant present

Court clerk Musundi