



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL APPEAL NO. 419 OF 2013**

**(Appeal from the Original Conviction and Sentence in Criminal Case No. 1174 of 2010 dated 3<sup>rd</sup> May 2011 in the Chief Magistrate's Court at Thika by Hon. B. Owino - SPM)**

**N M M.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant N M M was convicted after trial for the two counts of offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act 2006. The Appellant was sentenced to serve 10 years on each count to run consecutively. The complainant was his niece.

He has appealed to this Court against the said conviction and sentence. The Memorandum of Appeal had the following grounds:-

1. That the learned trial Magistrate made an error in both law and facts by basing Appellant's conviction on the evidence which was not sufficiently trustworthy to have been relied upon basing conviction.
2. That the case for the prosecution was not proved beyond reasonable doubt.
3. The evidence for the defence was not properly considered.

He was furnished with the certified proceedings and he filed Amended Supplementary Grounds of Appeal and brief submissions. In his amended Grounds of Appeal, the Appellant appeals against the Judgment of the learned Magistrate on the following Grounds

1. The entire trial was a nullity as the charge sheet in relation to Count 2 was defective in nature in that the particulars of the charge sheet omitted to indicate by what mean's the complainant's genitals were touched hence the conviction of Appellant was manifestly unsafe as the same was based on a defective charge sheet.
2. That there was a crucial irregularity in course of delivery of the judgment as the trial Magistrate convicted the Appellant on 2 counts of the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act being a duplicity of a charge founded on same facts.
3. The age of the complainant was not ascertained.

4. That the trial Magistrate made an error in both law and facts and grossly misdirected himself by holding that the child had some infections yet the matter was not proved.

Mr. Okeyo learned State Counsel for the Respondent opposed the Appeal. He said that the evidence tendered was sufficient to sustain the conviction. The trial Court convicted the Appellant on the alternative charge of indecent act with a child. The mother (PW1) of the child (PW2) noted that the girl was not her usual self and upon questioning the girl revealed what had happened regarding the Appellant and her. PW2 was aged 7 years. She testified and described how the Appellant who is her uncle while visiting the home lured her and kissed her and ended up defiling her. PW2 at first opened up to PW3 who was the house help on what had happened to her. However, PW3 dissuaded her not to tell anyone. PW5 the Clinical Officer at Ruiru District Hospital examined PW2 and made a finding that PW2 had indeed been sexually assaulted. Her hymen was broken and she had an infection in her private parts. On material date the Appellant had visited the home of PW1 and PW2. This places him at the scene where the offence took place. In his defence the Appellant never controverted the evidence. Learned State Counsel thus submitted that the conviction of the trial Magistrate was correct and the conviction on the indecent act was lawful. Mr. Okelo urged the Court to evaluate the evidence and the doctor having established penetration as well as the age of the victim, the trial Magistrate should have proceeded to convict on count 1 on defilement. He stated that the Court has the discretion to vary the sentence.

The evidence led was that the Appellant defiled the child who was his niece. She testified that Uncle Nico (the Appellant) took his penis and inserted it into her vagina. She was not as graphic as the Court. To quote her verbatim:

**After school I went to do homework. I was with my Aunt Faith and Uncle Nico in the sitting room. Then Aunt Faith went to the kiosk and she left me with Uncle Nico in the sitting room. He then closed the door and called me to the seat where he was. I went. He then put me on the seat and removed my pant. I was still wearing my school uniform. He removed my pant and put his urinating thing into my thing.....Then Faith came and I told her what Uncle Nico had done she slapped me and told me not to tell anyone. The next day Uncle Nico came for me from school and when we got home we were alone and then Nico kissed me on my mouth and put me on the couch. He then removed my pant and put his urinating thing into my thing again. I felt pain but I did not tell anyone.**

In cross-examination she was categorical that the Appellant had done this vile deed stating **You removed my pant and put your thing into my thing. Father and mother were in town.** She positively identified the Appellant as the person who defiled her.

In his defence the Appellant raises the issue of the duration it took to report the matter to the police being roughly 10 days from the date of incident and the age of the child. The age was confirmed by the birth notification certificate which showed that the child was born on 1<sup>st</sup> January 2003. At the time of the incident in 2010 the child was 7 years old. Even assuming that PW2 made an error on her age, the mother confirmed the age of PW2 as 7 years. PW2 herself stated that she was 7 years old when she gave her testimony.

Having carefully evaluated the evidence and considered the Grounds of Appeal together with the Supplementary Grounds of Appeal and brief submissions I find that there was sufficient evidence and basis for a conviction on the charge of defilement. The charges were substituted but the evidence adduced revealed the charge ought to have read defilement of a child contrary to Section 8(1)(2) of the Sexual Offences Act. I therefore enter a conviction under this section and I accordingly vary the sentence from 10 years to life imprisonment. The Appellant has a right to prefer an appeal to the Court of Appeal within 14 days.

**Dated, signed and delivered this 28<sup>th</sup> day of November 2013**

**Nzioki wa Makau**

**JUDGE**