REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL CASE NO. 453 OF 2010

T C K…… ……APPELLANT

VERSUS

REPUBLIC ……..……....…RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 871 of 2008 Republic vs. Tarcisio Chege Kihia in the Senior Principal Magistrate's Court at Kiambu by C. Kabucho , Senior Resident Magistrate on 10th August 2010)

JUDGMENT

The Appellant was charged with the offence of defilement of a child contrary to **section 8(1) of the Sexual Offences Act** and in the alternative to the offence of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act.** The trial magistrate acquitted the Appellant on the first count but convicted him for the alternative offence of committing an indecent act with a child and sentenced him to 10 years imprisonment.

The Appellant has appealed against the conviction as well as the sentence, relying on the following grounds of appeal:

1. That the trial magistrate erred by failing to take into account the issue of grudge raised by the Appellant in the course of his defence which proved that this was a framed-up case.
2. That the trial magistrate erred by failing to note that the prosecution did not prove its case beyond reasonable doubt.
3. That the trial magistrate erred in not considering that there was insufficient evidence to convict the Appellant on the charge of indecent act as the medical evidence adduced in court was not in favour of the prosecution.

On the first ground, the Appellant submitted that he was employed as a caretaker for 7 years in a family with 2 co-wives who did not get along and that he was employed by one of the co-wives. He further submitted that this case was brought against him by his employer's co-wife arising from the grudge that had been subsisting between her and his employer for many years. He further submitted that his employer's co-wife and her family wanted to fix him so that he loses his employment and that he was caught in between the feuds of the two families. He submitted further that the at the time of his arrest, a daughter of his employer's co-wife gave a bribe to the arresting officer known as Nyambane and that once he was locked in a cell in the police station, the same police officers asked him for a bribe before

they could release him.

On the second and third grounds, the Appellant submitted that after examination by Dr. Muhombe, the complainant was found to be HIV+ yet he himself is not and that she was also found to have a white discharge which did not link him to her whatsoever. He further submitted that the Police Surgeon Dr. Kamau examined the complainant 8 months after the offence and found that all was well. He further submitted that the P3 form was filled 8 months after the offence and was contrary to the evidence adduced.

On its part, the State opposed the appeal, submitting that the evidence of the complainant which was given through her father as her intermediary was that on 11th to 18th May 2008, the Appellant sexually assaulted the complainant. It was further submitted that the complainant's evidence was vivid, clear and consistent and that the complainant referred to the Appellant as 'Chege' and knew him as he was employed within their homestead for a period of years. The State further submitted that the complainant informed PW2 about the incident who in turn informed PW3 and that they reported the matter to the police and also took the complainant to Nairobi Women's Hospital for examination. She submitted further that the Doctor's findings were that the complainant's hymen was wide and that she had a white discharge. She further submitted that both PW2 and PW3 identified the Appellant in court as the person who sexually assaulted the complainant. She also stated that on 22nd January 2009, the complainant was referred to the Police surgeon PW4, who examined her and found that there were no physical injuries on her genitalia. The lead investigation officer PW6 stated that the sexual assault occurred on three occasions and that he arrested the Appellant. The State requested for an enhancement of the sentence meted out against the Appellant.

In reply, the Appellant opposed the State's submissions, insisting that the prosecution did not prove its case and that the evidence of the complainant was not corroborated. He insisted that the complainant was coached by PW3 on what to say in court. He further stated that the complainant, PW2 and PW3 were all family members and that there was no independent witness. He also stated that he should have been taken through a medical examination to prove that he was HIV- yet the child was HIV+. He further contended that the child's clothes were not produced in court as exhibits. He implored the court to take into account the fact that he is a first offender, is not familiar with court processes and procedures and not to enhance the sentence.

I have studied the trial court's record and have considered the submissions made by both the Appellant and the State. I am fully aware that the court was considering the complaint of a minor, a young girl of the age of 5 years at the time of the offence. In fact, due to this factor of tender age, the trial court was forced to appoint an intermediary to give evidence on her behalf and indeed settled for the child's father. Owing to this scenario, I am aware that the prosecution had an uphill task in trying to prove beyond reasonable doubt that indeed the complainant was sexually assaulted by the Appellant as she had reported. In fact, the evidence that emerged was that the first time the complainant was allegedly assaulted by the Appellant, she reported the incident to her aunt PW2 who in turn reported the incident to the child's grandmother PW3 and that both PW2 and PW3 decided not to take any action. This could have arisen out of their belief that such a small child does not know what sexual assault is all about and further doubted that the Appellant could do such a thing. We are told that they declined to take any action. We are further told that it is only when the complainant complained a second time to them that the Appellant had again assaulted her sexually that PW2 and PW3 decided to take action by reporting the matter to the police, who in turn arrested the Appellant and charged him with the offences of defilement and indecent assault. The complainant's evidence, given through her intermediary, was crucial to the success of this case. Upon review of the same and without the need to repeat it here, I formed the impression that the complainant had succeeded to convince the court that she had indeed been sexually assaulted by the Appellant. It emerged quite clearly that the complainant knew the Appellant well enough to be able to identify him as the person who assaulted her sexually in his house, which was within the homestead that the complainant lived. The complainant's description of what the Appellant actually did to her was vivid, clear and consistent. This evidence was corroborated to the evidence given by the other witnesses, particularly PW2, PW3 and PW6, all of whom were able to enable the court to form a more complete picture of what really transpired. After my own review of this evidence, I agree with the decision taken by the trial

magistrate to convict the Appellant for the lesser charge of committing an indecent act with a child.

To that extent therefore, I uphold both the conviction and sentence meted out by the trial magistrate and hereby dismiss the appeal.

SIGNED AND DELIVERED AT NAIROBI ON THE 15TH DAY OF NOVEMBER 2013

MARY M. GITUMBI

JUDGE