REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL CASE NO. 251 OF 2011

WILFRED OTIANG OCHIENG …….APPELLANT

VERSUS

REPUBLIC …….……..…….....…RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1640 of 2011 Republic vs. Wilfred Otiang Ochieng in the Chief Magistrate's Court at Makadara by D. Kinaro, Resident Magistrate on 26th September 2011)

JUDGMENT

The Appellant was charged with the offence of defilement of **M M**, a child of 14 years, contrary to **section 8(1)(2) of the Sexual Offences Act** and in the alternative to the offence of indecent act with the same complainant contrary to **section 11(1) of the Sexual Offences Act**. The Appellant was also charged with the offence of defilement of **FM**, a child of 13 years, contrary to **section 8(1)(2) of the Sexual Offences Act** and in the alternative to the offence of indecent act with the same complainant contrary to **section 11(1) of the Sexual Offences Act**.

After full trial, the trial magistrate acquitted the Appellant of the offences of defiling the two complainants but convicted him of the offence of committing an indecent act with the two complainants. He thereafter sentenced the Appellant to serve two prison terms of 20 years to run consecutively. Being aggrieved with both the conviction and the sentence, the Appellant filed his Petition of Appeal dated 30th September 2011 on the following amended grounds of appeal:

1. That the charge sheet in relation to the two alternative counts was not proved beyond reasonable doubt as required by law hence his conviction was unlawful, unjustified and unsafe.
2. That there was no justification for the trial magistrate to convict him on the two alternative charges given that the medical examination of PW3 and PW6 contained no evidence linking him to the commission of the offence charged.
3. That the evidence of his defense was not properly taken into consideration.

The State opposed the appeal, reiterated the evidence adduced in the trial and requested the court to uphold the conviction and sentence.

On the first ground of appeal, which is that the prosecution did not prove the two alternative counts of indecent act, the Appellant submitted that the same were not proved beyond reasonable doubt. The Appellant submitted that there was no evidence from the two doctors who examined the complainants which linked him in any way to the complainants. He submitted that the findings of PW1 after examining **M M** were that she had no injuries, no vaginal bleeding, had old hymenal tears and no signs of infection. He further submitted that he too was subjected to a medical examination by PW2 who found that he had no injuries, had normal genital organs with a retracting foreskin and with no discharge. On that basis, the Appellant submitted that this evidence does not prove that he committed the indecent act with either of the two complainants, specifically that no evidence was adduced to prove that he touched the two complainants with his penis as alleged. He therefore disputed the finding of the trial magistrate that he penetrated the genitals of the two complainants who were children within the meaning of the Children's

Act amounting to committing an indecent act. Upon perusal of the evidence adduced in the trial court, it emerged quite clearly that the evidence adduced by PW1, Dr. David Thuo, who examined the **M M** (PW3) noted she had a greenish discharge from her vagina, her hymen was torn and that her urine had bacteria infection. His conclusion was that she had been sexually assaulted. The same doctor examined **FM** on the same day and noted that her hymen was torn, her urine was normal and that she was HIV+. He also made a diagnosis of repeated sexual assault on **FM**. It is true that the evidence of this witness did not implicate the Appellant as the person who committed the sexual assault on the two complainants. Further, the evidence of PW2, Dr. Zephania Kamau, was also that the two complainants had old hymenal tears. He also examined the Appellant. Nowhere did PW1 and PW2 implicate the Appellant as the one who committed the offence of indecent act against the two complainants. What I find is that the evidence of these two witnesses established and proved before the trial court that the two complainants had actually been sexually assaulted. However, it is the evidence of the other witnesses which linked the Appellant to the commission of this offence. This was particularly the evidence of the complainants PW3 and PW4, which was corroborated by the evidence of the other witnesses. PW3's evidence was that the Appellant used to work as a watchman at [particulars withheld] Primary and that he took her to his house, asked her to remove her panty and lie on the bed. The Appellant then had sex with her and gave her Kshs. 50/-. It was her evidence that this happened repeatedly. It was her evidence that she introduced PW6, **M M** to the Appellant and that the two girls used to go to the Appellants house where he would have sex with both of them. PW4, the father of **FM** (PW3), testified that he got information from other school girls that the Appellant was having an affair with his daughter. He testified that he confronted the Appellant severally and reported the case to the police. He also testified that one time he followed his daughter at night to the Appellant's house where he confronted them. He also testified that in March 2011, his daughter disappeared for two weeks and he reported to the police and that she was found in the company of the Appellant together with **M M** .PW5, the mother of **M M** (PW6) corroborated the evidence of the complainants and PW4 when she testified that on 3rd March 2011, her daughter **M M** disappeared and was later found in the Appellant's house where they were arrested and handed to the police. She testified to knowing the Appellant since 2004 when he was a watchman at [particulars withheld] Primary School, a school located in [particulars withheld] slums where she lived. PW6's testimony further corroborated the evidence already adduced before the trial magistrate which indicated that the Appellant was indeed the person who sexually assaulted the two complainants. To my mind, the evidence pointing to the Appellant's guilt for the offence of indecent acts with the complainant was overwhelming. To that extent, I find that the Appellant's contention that the case was not proved beyond reasonable doubt is baseless. This ground of appeal therefore must fail.

On the second ground of appeal which is that there was no justification for the trial magistrate to convict him on the two alternative charges given that the medical examination of PW3 and PW6 contained no evidence linking him to the commission of the offence charged, I find that I need not delve any further in the evidence adduced in the trial court some of which I have reproduced above. My answer to this contention is that though the medical examinations did not link the Appellant to the complainants, they proved that the complainants were indeed sexually assaulted. I further added above that it is the evidence of the other witnesses which implicated the Appellant as being the one who committed the sexual assault against the complainants. This ground of appeal therefore fails.

On the third ground of appeal which is that the evidence of his defense was not properly taken into consideration, I note that the Appellant opted not to call any witnesses and to give an unsworn statement. In his unsworn statement, he stated that the charges were false as the police merely came to his house and arrested him for an offence he did not commit. I have studied the Judgment of the trial magistrate and note that he stated that the Appellant merely denied the charges. Upon further perusal of the Appellant's defence, I find that it generally comprises of a mere denial of the charges. I therefore find that the trial magistrate did take into consideration the Appellant's defense. This leads to my conclusion that this ground of appeal also fails.

Arising from the foregoing, I find that the Appellant's appeal must fail as noted above. However, I note that the trial magistrate sentenced the Appellant to serve 20 years imprisonment for the alternative charges of committing an indecent act with PW3 and another 20 years imprisonment for committing an indecent act with PW6 and that the two sentences shall run consecutively. That means that the Appellant

will serve a sentence amounting to 40 years imprisonment. I find that sentence to be unreasonably harsh taking into account that the minimum penalty prescribed in **section 11(1) of the Sexual Offences Act** is a prison term of 10 years. For that reason, I will vary the sentence meted out by the trial magistrate to a prison term amounting to 10 years for committing an indecent act with PW3 and a similar prison term for committing an indecent act with PW6, both terms to run concurrently.

SIGNED AND DELIVERED IN NAIROBI THIS 15th DAY OF November 2013

MARY M. GITUMBI

JUDGE