REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 154 OF 2012

SILAS MADIMBA ……..……APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 3313 of 2010 in the Chief Magistrate's Court at Kibera – Mrs. Nyakundi (PM) on 7th June 2011

JUDGMENT

Introduction

1. The Appellant, **Silas Madimba** was charged with the offence of Sexual assault contrary to **Section 5(1)(a)(10)** of the **Sexual Offences Act**. In the alternative he faced a charge of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006**. At the close of the trial, the appellant was convicted on the main charge and sentenced to serve 20 years imprisonment.

Brief Facts

2. The particulars of the charge were that on the 6th day of August 2010, at *[particulars withheld]* area in Nairobi District within Nairobi area, he intentionally and unlawfully committed an act by inserting his fingers into a female genital organ (vagina) of one namely S N J, (initials used to protect the minor's identity) a girl aged (5) years.

Grounds of Appeal

3. The appellant being dissatisfied with the conviction and sentence, filed an appeal based on grounds which may be summarised as follows:

1. ***That the charge sheet was at variance with the evidence adduced.***
2. ***That the prosecution's witness's testimonies were inconsistent and contradictory.***
3. ***That the prosecution case was not proved to the required standard.***

Submissions

4. The appellant submitted that the prosecution's case was not proved against him beyond reasonable doubt, and that the evidence adduced by the prosecution was not enough to convict him. Mr. V.I Kabaka, learned state counsel on his part opposed the appeal on behalf of the respondent, for reasons that the prosecution had proved their case to the required standard, resulting in the appellant's conviction.

Summary of the Case

5. S N J who was five years old and therefore a child of tender years, testified without oath because upon being subjected to voire dire examination under **Section 19(1) Oaths** and **Statutory Declarations Act, Cap 15 LoK**, she was found **not** to know the meaning of an oath, or to understand what it meant to swear on the bible.

6. S N J told the court that she was at home on the 7th of August 2010 when the appellant came to their house. He placed her on the bed and removed her clothes. He then kissed her and put his fingers in her private parts. The appellant then told her to put on her clothes, gave her a sweet and let her go. She found her mother **PW3** whom she informed what had happened. The appellant was subsequently arrested.

7. The appellant gave a sworn defence and called two witnesses. He advanced an alibi defence in which he told the court that on the day of his arrest he had just returned to his house from school, with one Boniface, (**DW2**) when they heard a knock at the door at about 7.15 p.m. The visitor did not enter the house and instead hurled insults at him and then ran away. He however, recognized the person's voice as that of a neighbor, **PW3**.

8. He followed her to house where he met her husband and informed him of what had transpired and how his wife had accused him of indecently assaulting their daughter. They proceeded to the police station together and on arrival, the police put him in the cells after **PW3'**s husband accused him of the same thing before them.

Issues for Determination

9. The question for determination is whether the evidence was sufficient to prove that the minor was indecently assaulted and if so, whether it sufficiently linked the appellant to the offence.

Analysis of Evidence

Evidence of Identification

10. As the first appellate court, I have re-evaluated the evidence afresh to make my own findings and draw my own conclusions. In so doing I have made allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses which I did not have.

11. I am alive to the fact that the evidence against the appellant rested on the testimony of **PW1** and that as observed in **Abdalla Bin Wendo v Republic (1953) 20 EACA pg 166,**

> **"Subject to certain exceptions a fact is capable of proof by the testimony of a single witness."**

I also warned myself in line with **Roria v Republic (1967) EALR pg 584** that:

> **"There was indeed a danger in basing a conviction on the identification of a single witness and this Court had a duty in a case where this has been done to satisfy itself that in all the circumstances the conviction was safe."**

Having so laid a basis I examined the circumstances under which the appellant was identified for

possibility of error.

12. From the evidence before me it is clear that the appellant and the minor were well known to each other. From the cross examination, the appellant did not deny or even question the fact that he indeed, was known as **'Boy'.** In his cross-examination of the minor the appellant seemed to suggest that **PW1** and his sister used to frequent his house to either play or receive some tuition from him. The minor however, maintained that there was nothing that took either of them to the appellant's house, but that she knew the appellant who lived near their house. The trial Magistrate took note and made the following observation:-

> "**The complainant knew the accused person well, as he had been living in the same plot with her family for 3 to 4 years, there is no issue as to identification**"

13. I further note from the evidence that **PW1** was very clear in her description of the appellant. This was her expression:

> **"I then went and showed my mother who 'boy' was……'boy' lives near our house. I know him very well. I just know him as 'boy'**."

14. The evidence of **PW3** lent credence to that of the minor. **PW3** testified that on the 6th August 2010 she was at home preparing supper when she sent the minor to the house to put on a pair of trousers. The minor took longer than usual and returned after about 10 to 15 minutes. When **PW3** inquired where she had been she started crying and running away.

15. On further inquiry the minor narrated to **PW3** how she had been lured by the appellant to his house where he made her sit on a chair in the pretext of buying her a sweet; that he had then told her to climb into the bed; that he too climbed in, applied oil on his fingers and inserted them in her private parts, and also kissed her on her lips.

16. **PW3** checked the minor's genitalia and confirmed that they were smeared with oil and that her vagina had widened. She informed her husband who then summoned the appellant. The appellant denied the accusations but they took him to the chief's camp at Kibera, where they left him and took the minor to hospital.

17. The learned trial magistrate noted that **PW1** mentioned the appellant by name to **PW3** and that is how his identity came to be known. She also took further cognizance of the fact that the appellant was a tenant in a house belonging to **PW3**'s brother in law. In the premise this court concurs with the learned trial magistrate's findings that the identification of the appellant was proper.

Evidence of Sexual Assault

18. The minor's testimony found support in the evidence of **PW2,** Dr. Charles Gachewa of Nairobi Women's Hospital. He produced the report on behalf of Dr. Adam who had since relocated to another country. He testified that he had worked with her and was conversant with her handwriting, signature and reports.

19. **PW2**, testified that the minor was examined at the hospital on 6th August 2010 on allegations of sexual assault. She was found to be calm and well kempt. Upon examination the Dr. observed the following:-

a. *She had normal external genitalia*
b. *Active leaking of urine*
c. *Very inflamed entrance of vagina and hymen (reddish in color)*
d. *Hymen was intact, and no discharge or lacerations were noted*
e. *She tested negative for HIV, syphilis and hepatitis*
f. *Vaginal swab was normal.*

The conclusion was that there had been sexual assault and the patient was put on treatment and counseling. The report was stamped by Dr. Adam and produced as exhibit 1 by **PW2**.

20. **Section 5** of the **Sexual Offences Act No. 3 of 2006** , defines the offence known as **"Sexual Assault"**, as follows:-

"5(1) ***Any person who unlawfully -***

(a) Penetrates the genital organs of another person with

(i) Any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed as sexual assault."

The offence of sexual assault is therefore, complete upon penetration of the sexual organs of another person with any part of the body of another or that very person.

21. Counsel for the appellant submitted that the prosecution's witness's testimonies were inconsistent and contradictory, because **PW3** testified as follows:

"…..I find the child had been smeared oil on her vaginal and her vaginal had widened……(sic)**"**

while **PW1** in her evidence did not refer to any smearing of oil on her vagina. Counsel also submitted that **PW1** stated that:

"He took me to his house and placed me on the bed" whereas PW3 stated that "…***he made her sit on a chair and told her he could buy her a sweet*** ".

22. After a careful analysis of the evidence as a whole, I find that the above contradictions are not material. The evidence as to whether or not the appellant smeared oil on **PW1**'s vagina was not the key factor in determining the guilt of the appellant. The appellant was identified beyond reasonable doubt as the perpetrator of the act and it was clear from the medical report that **PW1** had been assaulted sexually.

23. As stated earlier, **PW1** was a five year old minor who could not have been expected to recall all the finer details of what was done to her. The trial court expressed satisfaction in her capacity to testify and also the fact that she was telling the truth. There was no manifest reason for her to fabricate evidence against the appellant. I therefore find no reason to disagree with the learned trial magistrate.

24. The appellant also complained that the variance between the charge sheet and the evidence rendered the charge to be defective. The variance in issue is the use of the word "***fingers***" in the charge sheet versus "***finger***" in the examination in chief of **PW1**.

25. I have scrutinized the evidence on record and I am in agreement with submissions of the learned state counsel that the variance occasioned no prejudice to the appellant and was curable under **Section 382** of the **Criminal Procedure Code**.

26. For the foregoing reasons I am satisfied that the conviction entered against the appellant was based on sound evidence and the sentence of twenty years imposed on the appellant was lawful. I

therefore find that the appeal is unmerited and is dismissed. I uphold both the conviction and sentence imposed by the learned trial magistrate.

SIGNED DATED and **DELIVERED** in open court this **18th** day of **December 2013.**

L. A. ACHODE

JUDGE