REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 156 OF 2012

JOSEPH MATERE MIGWI…….APPELLANT

-VERSUS-

REPUBLIC …….....……..RESPONDENT

(From the original conviction and sentence in Criminal case Number 102 of 2011 Senior Resident Magistrate's court at Baricho Mr. J.N. Mwaniki – (SRM)

JUDGMENT

The appellant **JOSEPH MATERE MIGWI** was charged in two counts with the offences of attempted defilement **contrary to section 9(1) as read with Section 9(2) of the Sexual Offences Act** and the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal code.**

In the first count of attempted defilement, it was alleged that on the 2nd day of February, 2011 in Kirinyaga South of the Central Province, the appellant attempted to defile ***JOW*** a child aged 4 years.

There was also an alternative charge in which the appellant faced the charge of committing an indecent act with a child contrary to **section 11(1) of the Sexual Offences Act** (the **Act**) in that on the same day and place, he committed an act of indecency with ***JOW*** a child aged 4 years by rubbing his penis against her buttocks .

The particulars in count two alleged that on the same date and place, the appellant unlawfully assaulted ***JOW*** occasioning her actual bodily harm.

After a full trial, the appellant was convicted on the main charge of attempted defilement and was sentenced to fifteen years (15) years imprisonment. He was acquitted of the charge in count two under **section 215** of the **Criminal Procedure Code**.

Being aggrieved by the conviction and sentence, he filed this appeal relying on the grounds stated in the petition which can be summarized as follows:

1. ***The Learned trial magistrate erred in law and fact by failing to appreciate that he was not well prepared to proceed with the case as he had not been supplied with witness statements.***
2. ***The learned trial magistrate erred in law and in fact by failing to find that the charges were a fabrication by the complainant's father who had a grudge with the appellant in a bid to cover up his crime of having assaulted him on the date the offence was allegedly committed.***
3. ***The learned trial magistrate erred in law and in fact by failing to find that the complainant was not a truthful witness as she had been coached by her mother on what to tell the court.***
4. ***The learned trial magistrate erred in law and in fact by failing to consider my defence and***

mitigation.

When the appeal came up for hearing, the appellant chose to rely entirely on what he referred to as written submissions but which in reality were further grounds of appeal which he presented to the court.

The state through learned state counsel M/S Macharia opposed the appeal mainly on grounds that the evidence on record proved the guilt of the appellant beyond doubt and that he was rightly convicted.

Turning now to the facts of the case, it is the prosecution case that the appellant lived in the same neighborhood with the complainant and her family. On 2nd February 2011 at around 5p.m, PW5 her elder brother was at home with the complainant when the appellant joined them. He thereafter left for the shamba leaving the appellant with the complainant at their home but on his return, the two were missing. PW2, the complainant's father after learning of their disappearance went to the shopping centre and alerted members of the public who mounted a search for them . They included PW3 and PW4. They split into different groups and went for the search in different directions. PW3 and PW4 went into the rice fields where they found the appellant alone with the complainant holding her hand. They rescued the girl and took her home.

PW2 recalled in his evidence that when he found the complainant at home, he noted as did PW4 the she had scratch marks on her face and neck and she wore her trouser inside out.

The details regarding how the complainant had found her way to the rice field were provided by the complainant herself.

After a brief voire dire examination in which she was found fit to give an unsworn statement, the complainant, a girl aged 4 years who testified as Pw1 told the court that on the material day, the appellant whom she knew before as he used to visit their home took her from their home, bought her chips at Mama Carol's shop before he led her to the rice field. She recalled that once inside the rice field, the appellant removed her clothes as well as his own; inserted his fingers and spat some saliva into her private parts; strangled her on the neck and bit her on the cheek. She started crying. This is when some people who included PW3 and PW4 went to her rescue.

It was PW1's evidence that at the time PW 3 and PW4 found them, the appellant had already put back her clothes, comprising of under pants, trouser and a "T" shirt. The matter was thereafter reported to the police and the appellant was arrested.

PW7 is the police officer to who the matter was reported on 3rd February 2011. He noted that PW1 had scratch marks on her face and he issued her with a P3 form which was dully filled by PW8 a clinical officer at Sagana Health Clinic.

According to the evidence of PW8, on examining PW1, she found that she had small bruises around her genitalia but there was no evidence of penetration.

In his defence, the appellant gave an unsworn statement and did not call witnesses.

In his unsworn statement, the appellant denied having committed the offence claiming that on the material day, he had left Kagio town at 7 p.m and went to his rice farm. As he was going back home, he met with the complainant's father (PW2) who assaulted him alleging that he had left with his daughter. It was the appellant's case that PW2 framed him with the offences in this case to cover up his assault on his person

This being a first appeal, this court is duty bound to re-examine and consider afresh the evidence on record to enable it make its own independent conclusions without of course losing sight of the fact that it did not see or hear the witnesses. See

- **KIILU & ANOTHER VS REPUBLIC (2005) I KLR 174**

- **KIMEU VS REPUBLIC(2002) I KLR 756**

I have carefully considered the submissions made by the appellant and the state counsel as well as the grounds of appeal. I have also re-evaluated the evidence on record.

Having done so, I find that PW1 gave clear and straight forward evidence regarding how the appellant, a person she knew before lured her to the rice fields after buying her chips. She also gave a detailed account of what the appellant did to her while on the rice field before she was rescued by PW3 and PW4.

It is my finding that PW1 must have been a truthful and reliable witness as her evidence was supported by the evidence of PW5 who found her missing from home after having left her in the company of the appellant and the evidence of PW6 Mama Carol who confirmed having sold some chips to the appellant who had been in the company of the complainant . This was just before the complainant and the appellant were discovered missing.

The appellant's claim that PW 2's father had fabricated the charges against him allegedly to cover up his crime of having assaulted him that evening cannot be true because the appellant was caught red handed by two independent witnesses in the rice fields with the complainant . The appellant did not attempt to explain what he had been doing with the complainant a child aged 4years in a rice field that late at night.

The fact that the appellant had undressed her, removed his clothes, spat on her vagina possibly to lubricate it and the fact that upon examination by PW8 on the following day she was found to have bruises around her genitalia proves beyond doubt that the appellant had attempted to defile the young girl and would probably have completed his mission if he had not been interrupted by the appearance of PW3 and PW4. It would appear that when he heard PW3 and PW4 calling out for PW1, the appellant dressed her up in a hurry explaining why she had worn her trouser inside out when she was rescued from the scene.

In his grounds of appeal, the appellant had complained that he was not prepared to conduct his defence as he had not been provided with witness statements.

I have gone through the record of proceedings and they do not show that the appellant had ever applied to be supplied with witness statements at any time in the course of the trial. Having failed to request to be supplied with witness statements in the lower court, the appellant cannot now complain on appeal that he had been denied those statements.

The allegation that the trial magistrate failed to consider his defence is also not merited. The court record clearly shows that the learned trial magistrate compared the appellant's defence with the evidence adduced by the prosecution and correctly arrived at the conclusion that his defence was unworthy of belief.

Lastly, though it is true that the complainant's age was not proved by any documentary evidence, the evidence on record leaves no doubt that the complainant was a child of tender years at the time the offence was committed. PW1 in her evidence put her age at four years. She also informed the court that by the time she was testifying, she was in nursery school a fact which was not disputed by the appellant.

The learned magistrate who saw her testify must have confirmed that she was a child of tender years (below 10 years of age) and that is why he under took the voire dire examination.

In the circumstances, I find no merit in the submission that the trial magistrate erred in convicting the appellant in the absence of documentary evidence regarding the complainant's actual age. My take is that as long as there was evidence to establish beyond doubt that the victim was a minor, proof of the actual age of the victim was not necessary for purposes of proving the offence.

For the foregoing reasons, I am inclined to agree with the trial magistrate that the evidence on record

proved the guilt of the appellant as charged in count 1 beyond any reasonable doubt.

It is therefore my conclusion that the appellant was properly convicted. In the premises the appeal against conviction is hereby dismissed.

On sentence, the offence for which the appellant stands convicted attracts a penalty of not less than ten (10) years imprisonment.

The appellant was sentenced to 15 years imprisonment but since the prosecution confirmed that he was a first offender which fact the learned trial magistrate does not seem to have considered while passing sentence, i will allow the appeal against sentence and reduce the sentence imposed to the minimum allowed by the law.

I therefore set aside the sentence meted out by the trial court and substitute it with a sentence of ten(10) years imprisonment to take effect from the date of conviction that is 25th July,2013 . It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELEVERED AT KERUGOYA THIS 11TH DAY OF DECEMBER, 2013 In the presence of:-

The appellant

M/S Macharia for the state

Kariuki Court Clerk