REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 63 OF 2010

BONFACE MATHEW BWIRE……..…1ST APPLICANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

The appellant Boniface Mathew Bwire was charged with defilement contrary to section 8 of the sexual offence act with an alternative charge of indecent act with a child contrary to section 11(1) of the same act. He was convicted of the offence of an indecent act with a Child and sentenced to ten (10) years imprisonment.

This appeal is against conviction and sentence. Mr. Okutta holding brief for Maloba & Co. Advocates argued the appeal on behalf of the appellant. Among the five (5) grounds in the petition, the counsel chose to argue only ground 5 which reads:

"5. That the learned Senior Principal Magistrate erred in law and fact by arriving at his decision against the weight of the evidence on record".

The counsel raised the following issues:

a. That the evidence of the complainant was not corroborated;

b. That the charge was not supported by sufficient evidence.

The state counsel Mr, Okeyo opposed the appeal on grounds that all the ingredients of the offence of an indecent act with a child were proved. The existence of spermatozoa or evidence of penetration was not required according to Mr. Okeyo.

The facts are that on the 11/2/2010 at around 5.00pm the complainant (Pw 1) was playing with other children outside her parent's home. The appellant who had rented a house in the same compound came and held Pw 1 by the hand and led her to his house. He laid her on his bed and undressed her. He then sexually assaulted her. The other children came and called out the accused who opened the door and Pw 1 went out. Pw 1 reported the incident to her mother who took her to hospital. The appellant was later arrested and charged with the offence.

The evidence of Pw 1 aged six years was that the appellant took her to his house. He locked the door, removed her skirt and put her on the bed. The complainant said the appellant whom she knew well as a close neighbour lay on top of her and did bad thing to her. He then wiped her private parts using a wet cloth. The playmates of Pw 1 namely S, D and E came to the door following her. They called the

appellant by his name “Bonny”. The appellant then opened the door letting out the complainant who went out crying. The complainant though a child of tender years explained the sequence of events before she was sexually assaulted. These included how she was led to the house, undressed and then indecently assaulted before her playmates interrupted by knocking the door. It is not true as alleged by the defence that Pw 1 only said that the appellant “did bad things to her”. This was a phrase earlier used to conclude the acts of indecent assault described by PW1. The evidence of Pw 1 is clear that the appellant indecently assaulted her.

Pw 2 S.N who was present in the playing field was informed by the other children that Bonny had taken Pw 1 to his house. She then proceeded to the house of the appellant which was a three bedroom one. She found the main door open and entered in the sitting room. The door to the bedroom was locked. Pw 2 called out the complainant and threatened to go and report her. The appellant immediately opened the door and released Pw 1. Pw 2 confirms that Pw 2 was crying when she came out of the appellant’s bedroom. She was also walking with her legs apart. It is Pw 2 who reported to her mother Pw 3 what had happened to her younger sister.

Pw 3 testified that she went to work on the material day (11/02/10) in the morning. When she returned at around 8.00pm, Pw 2 informed her about the ordeal involving her sister and the appellant. Pw 1 confirmed to her mother that the appellant had sexually assaulted her child and found that some mucus on her right thigh. Pw 3 went to the house of the appellant parents. The appellant on being questioned admitted having slept with the complainant. Pw 3 reported the matter to Port Victoria police station the following day. Pw 1 was also medically examined the same day the report was made to the police.

The investigating officer visited the house of the appellant. He was shown the bed on which the appellant indecently assaulted the complainant. He issued Pw 1 with a P3 form and later preferred the charges against the appellant.

The evidence of Pw 5 the clinical officer who examined Pw 1 was that he found the hymen intact ruling out any penetration.

The appellant denied the offence. He said he saw the children playing outside. He then entered his house and slept in his bedroom. He was later woken up by noise from the children including Pw 1 who had entered his sitting room. The appellant beat up Pw 1 with a slipper. The sister Pw 2 screamed and told the public that the appellant had done bad things to her sister.

The court relied on the evidence of Pw 1 and Pw 2 to convict the appellant. The magistrate noted in his judgement that the evidence was strong and consistent. The magistrate observed that the act of wiping Pw 1’s private parts with a wet cloth removed spermatozoa. However, the court found that there was evidence of indecent assault.

The appellant did not give a good reason why Pw 2 would frame the case against him. This defence was dislodged by the direct and detailed evidence of Pw 1 who explained exactly what was done to her by the appellant. The narration by Pw 1 of the acts of the appellant in sequence leaves no doubt that the child was indecently assaulted. Pw 2 corroborated the evidence of Pw 1. She was a courageous young girl who went right into the house of the appellant to rescue her sister from trouble. The lack of medical evidence led the magistrate to convict the appellant of the alternative charge. No medical evidence was required in corroboration in an offence of this nature.

I find that the conviction was based on cogent evidence and therefore safe section 11 of the Act provides for a sentence of not less than ten(10) years for an offence of indecent assault. The sentence was therefore within the law. I find that this appeal has no merit. The conviction and sentence are hereby upheld.

F.N. MUCHEMI

Judgement dated and delivered on the 13th day of February 2012.

In the presence of the appellant, the state counsel and the defence counsel Mr. Miano holding brief for Ms Maloba.

F.N. MUCHEMI

J U D G E