REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 215 OF 2010

RICHARD SIRIMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, **Richard Sirima** was convicted by Limuru Senior Principal Magistrate M. A. Murage for the offence of defilement of a girl contrary to **Section 8(1)** of the **Sexual offences Act No. 3** of **2006**. In the alternative, the appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006**. It had been alleged in the charge sheet that on 18th April 2008 in Kiambu West, intentionally and unlawfully he defiled C.M a girl aged six years old.

2. Upon his conviction he was sentenced to serve 20 years imprisonment. Being dissatisfied with both conviction and sentence he filed his appeal in the superior court relying on the following grounds as amended:

1) ***He was not accorded his rights under Section 49 (f) (i) (ii) of the constitution.***

2) ***He was not accorded a fair hearing as required under Section 50 of the Constitution.***

3) ***The credibility of PW3 was in question.***

4) ***The prosecution case had material contradictions.***

5) ***The trial magistrate rejected his defence without giving reasons.***

Brief facts of the case were that on 18th April, 2008 at about 4 p.m., C.M. who was a minor aged 6½ years and who testified as **PW1,** was playing outside her home with a child named M, when the appellant pulled her into his house and defiled her. Her screams attracted the attention of her sister P.K, who rushed to the scene. The appellant ran away from the scene. P.K. took the complainant home and washed her. **3. PW2** herself a minor aged 10 years did not report the incident to their father **PW3** until three days later when the father noticed that C.M. was walking with difficulty. He took PW1 to hospital and learnt that she had been defiled. He reported the matter to the police. Subsequently the appellant was arrested and charged accordingly.

4. The appellant testified without oath and denied the offence. He told the court that on the material date he spent the day sleeping because he had been on night duty.

3. At the end of the trial in which the prosecution called five witnesses in support of their case, and the appellant called two witnesses in re-buttal, the learned trial magistrate convicted the appellant on the main charge and sentenced him to serve 20 years imprisonment.

4. Being the court of first appeal I have carefully analysed and re-evaluated the evidence on record in line with **AJODE V REPULIC [2004] 2 KLR** keeping in mind that I did not have the advantage of observing the witnesses as they testified.

5. I have no doubt however from the evidence on record that **PW1** was defiled on the 18th April 2008. **PW4** was Dr. Githuka the medical officer Kiambu West and was based at Tigoni. In his testimony he examined the minor on 22nd April 2008 and established that she was aged 6½ years, at the time of examination. His findings upon examination were that the minor had:

(i) Healing bruises on the external genitalia,

(ii) Had a foul smelling discharge

(iii) Was HIV and syphilis negative.

He told the court that he did not extract spermatozoa for testing because the child was brought to him four days after the act. The child was counselled and treated but he did not examine the appellant because the appellant was not brought to him for examination.

7. In his expert opinion, even if there was no complete penetration it would still amount to defilement and the victim would still sustain injuries. He confirmed that **PW1** had been defiled some four days before he examined her, and I accept his evidence as did the trial court.

8. The question for determination is therefore one of identification of the defiler. It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error, before it can safely make a basis for conviction. The star witnesses on the question of identification were **PWI** a minor aged about 6½ years at the time of the assault and **PW2** her sister, also a minor, aged about 10 years. The identification of the appellant was not

in doubt. The offence occurred in broad daylight at about 4.00 p.m. **PWI** was pulled by a person she knew well and he took her into his house. He was a neighbour who worked with **PW3** the father of PWI.

9. The trail court which had the advantage of seeing and hearing the witnesses testify had this to say of PWI:

"PWI the complainant told the court that she knew accused and even called him by his name. She pointed at him as the person who pulled her to his house."

From reading the evidence on record I do agree with the learned trial magistrate that **PWI** gave an intelligent account of what happened. After she had pointed him out in court and said that she knew his name she said that he pulled her and put her on a bed in his room. He then removed her pant, and that she lay on her back. He folded her clothes to her chest, removed his trousers and did what she called "bad manners' to her. In her own words according to the record she said that **"he put something in my private parts"** and she pointed at her private parts. She also said that she felt pain and cried out and that is when her sister P.K. came to rescued her.

10. I found that her testimony flowed well into that of P.K. P.K. testified that on the material date she was fetching water having left PWI playing outside the house with a neighbour's child. Presently she heard C.M. crying from the appellant's house. P.K. ran to the appellant's house and at that moment the appellant opened the door and pushed C.M. outside. She did not ask what the problem was but she took the child home and washed her. She stated that her mother was away and they had been left with their father. She noticed three days later that C.M. was walking with her legs apart and when she checked her private parts she found puss. Upon cross-examination she said that other neighbours had gone to get their pay but the appellant had remained behind.

11. Again the observation of the learned trial magistrate who had the opportunity to see and hear the two witnesses testify was that the evidence of P.K. was not shaken on cross examination and she had no reason to doubt the evidence of both C.M. and P.K.

12. The evidence of **PW3** the father to the minors lent credence to the testimonies of the minors in so far as he stated that, on 18th April 2008 he had gone to get his pay and that his wife had gone to their rural home. He only noticed some days later that his 6½ year old daughter was walking with difficulty. It was at Mabroukie hospital that he learnt that she had been defiled. On cross-examination PW3 said that the child mentioned the appellant's name and when they returned home she led PW3 to the appellant's house.

13. To all this, the appellant tendered a defence of denial and stated that on the material date he spent the day sleeping because he was on night duty. He called two witnesses in support of his defence but upon considering their evidence in totality the learned trial magistrate found that the evidence of DWII and DWIII contradicted that of the appellant. DWII told the court that the appellant had spend the whole day on 18th April 2008 entertaining guests and DWIII confirmed that he was one of those guests and that they left the house of the appellant at 5 p.m.

14. I am aware that this being a criminal trial there is no duty upon the appellant to prove his innocence or indeed to explain himself. Having chosen to tender evidence in his defence however, the court was under duty to analyse it alongside all other evidence on record. Having re-evaluated the evidence from the defence together with all other evidence on record, I agree with the learned trial magistrate that the evidence tendered in defence was contradictory. In fact it was so contradictory as to render itself incapable of being believed.

15. In considering the grounds of appeal, I find that on ground No. I the appellant's remedy for being brought to court later than 24 hours lie elsewhere and does not render this trial a nullity. On ground No. 2 he stated that the court record did not reflect the language used when the court read him the amended charge sheet. I however note from the record that the trial magistrate proceeded to take the evidence of PW1, PW2 and PW3 immediately thereafter, and that the appellant fully exercised his *right* of cross-examination of prosecution witnesses. So long as those elements were achieved, no appearance of infringement of the appellant's trial rights is left.

16. The importance of the requirements for suitable language interpretation is that they enable an accused person to hear and be heard, as part of the trial process. This court must set its sights particularly on that practical angle to communication in Court, as it is this that empowers or disempowers an accused person during a criminal trial. From the facts before this Court, I concluded that the appellant had not suffered any disadvantage during trial, on account of difficulties of language. Not only did the appellant participate in the proceedings by asking pertinent questions but the appellant raised no complaints of inability to follow the proceedings because of language problem.

16. On grounds No. 3 and 4 I have re-evaluated and analysed the evidence on record a fresh and I find no discrepancies in the evidence of PW3 that would raise credibility issues. I also find no contradictions in the prosecution evidence.

17. On ground No. 5 the learned trial magistrate did explain that she rejected the appellant's testimony because it was contradicted by his own defence witnesses. The visitors referred to by the two defence witnesses were never mentioned by the appellant himself who said he spent the day sleeping. I respectively agree with the learned trial magistrate.

17. The evidence that implicated the appellant was that of C.M. 6½ years old minor. She narrated in detail what transpired and the medical report supported her evidence as did the evidence of P.K. The learned trial magistrate was convinced of the truth and sincerity of the two minor witnesses. Act No. 5 of 2003 amended Section 124 of the Evidence Act to read as follows:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

I am satisfied that the record reflects the reason for believing that the child C.M., who was the only one in the room with the appellant when the defilement took place, was telling the truth. In light of my findings on the basis of the evidence on record, I am satisfied that the appellant did not suffer any breach of his rights under the constitution during the trial in any way. That the evidence of **PW3** was credible and there were no contradiction in the prosecution case on the contrary the contradictions were in the appellant's defence. The Hon. Trial magistrate duly considered the defence and rejected it.

18. I therefore dismiss the appellant's appeal, uphold the conviction, and affirm sentence as imposed by the trial court.

SIGNED DATED and **DELIVERED** in open court this **9th day** of **February 2012**.

L. A. ACHODE

JUDGE