PETER MBITHI MAKOVE…...……APPELLANT

VERSUS

REPUBLIC ...…….RESPONDENT

(Being an appeal from the convicting and sentencein MakueniPrincipal *Magistrate's Court Criminal Case No. 139 of 2009 by Hon. P.M. Nyakundi, PM on 28/5/2009)*

JUDGMENT

The Appellant, **Peter Mbithi Makove** was charged before the Principal Magistrate's Court at Makueni with the offence of attempted defilement of a child under the age of 11(eleven) years contrary to section 9(1) of the Sexual Offences Act. The particulars of the offence were that on the 2nd April, 2009 in Mbooni West District within Eastern Province, he unlawfully and intentionally attempted to have carnal knowledge of **KM,** a child aged 4 years. In the alternative the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence being that on the same day and plac, he intentionally and unlawfully did an indecent act to **KM,** a child aged 4 years by touching her private parts. The appellant pleaded not guilty to both counts and was soon thereafter tried.

The case for the prosecution in brief was that on 2nd April, 2009 at about 10.00 a.m. PW3, **TKM** PW4, **JM**N hildren, one of them PW2, **KM,** the complainant at home alone. Upon PW3 coming back at about 1.00 p.m she found PW2 asleep on the verandah. When she woke her up and she went for a short call, she had a limping gait and complained of pain in her private parts. When PW3 inquired further, PW2 informed her that one, **Loma** had come to their home in their absence and put his penis in her private parts after telling her that he wanted to massage her. She had pain, but that he warned her not to cry, otherwise he would beat her.

PW3, upon coming by this information, checked the complainant who was bleeding in her private parts. She immediately reported the matter to the village elder and Mukuyuni Police Station as well where they were issued with a P3 from and referred to hospital for treatment. PW2 was thereafter taken to Mbooni District Hospital and was attended to by PW1, **Thomas Leting,** a clinical officer who upon examining her noted that the complaint had a foul smelling discharge from her vagina and examination of the urine showed presence of pus cells an indication of infection of the urine. She also had a small tear on the vagina opening; though the hymen was intact. His assessment was that there had been attempt at defilement.

PW5, **Maithya Ilovi,** the village elder who received the report from PW3 and PW4 traced the appellant on the same day, arrested him and took him to Mukuyuni Police Station where he was later transferred to Mbooni Police Station. PW6, **P.C** (w) **Wasrah Abdallah** of Mbooni Police Station received the appellant on 5th April 2009 together with the report of the complainant. She commenced investigations by recording statements. Upon receiving the P3 form, she then charged the appellant with the offences.

Upon being placed on his defence, the appellant gave an unsworn statement and did not call any witness. He stated that on 2nd April 2009 he woke up at 8.00 a.m and went to the home where he used to

work and remained there until 10.00 a.m. He then left for Mukuyuni where he stayed upto 4.00 p.m. He then went back to his home and worked until dusk. Later at about 7.00 p.m as he was taking tea in a nearby kiosk, he was arrested by the village elder and taken to Mukuyuni, Mbooni and later Makueni Police Station and charged with the offences, of which he denied any knowledge.

The learned magistrate having examined and considered the evidence on record held:-

"***I am satisfied from PW2's testimony that it is the accused person who was well known to her who committed this beastly act. Although he did also allude to a land dispute between him and the parents of the complainant; both PW3 and PW4 denied the existence of such grudge and I find no basis or truth in this allegation, particularly in the face of the medical evidence which confirms beyond any measure of doubt that an attempt was made to defile the complainant.***

In the circumstances therefore, I find that the main charge of attempted defilement of a child under the age of eleven years contrary to section 9(1) of the Sexual Offence Act has been proved beyond any reasonable doubt. I dismiss the defence by the accused, find the accused person guilty as charged and convict him under section 215 of the criminal Procedure Code".

Upon conviction the appellant was sentenced to 20 years imprisonment. That conviction and sentence triggered this appeal. Basically 2 grounds of appeal were advanced to wit; that the trial magistrate erred by failing to realize that the prosecution case had not been proved against the appellant to the required standard and that in convicting him, the trial magistrate relied and acted on hearsay evidence.

When the appeal came up for hearing before me on 13th June, 2012, the appellant opted to canvass the same by way of written submissions. I have carefully read and considered them.

The State opposed the appeal. In doing so **Mr. Mukofu,** Learned State Counsel submitted that the appellant was positively identified by the complainant; the offence having been committed in broad daylight. The evidence of the complainant was corroborated by the evidence of the clinical officer as well as that of her mother.

I have anxiously considered the evidence on record, the judgment of the learned Principal Magistrate, the grounds of appeal and the rival submissions of the appellant and the State. This is a first appeal; as such I am enjoined by law to revisit the evidence that was before the trial court, analyze it, evaluate it and come to my own independent conclusion. In other words a first appeal is by way of a retrial and facts must be revisited and analyzed afresh.

No doubt, the appellant was positively identified by the complainant. He was a person well known to her. The appellant did not dispute the fact that he was well known to the complainant and indeed her family. The offence if at all, was committed in broad daylight. Indeed this was a case of recognition as opposed to facial identification of the appellant. The appellant has in his submissions raised the issue of an existing grudge between him and the complainant's family over land. This is a further proof that the appellant was well known to the complainant and her family. This cannot therefore be a case of mistaken identity or recognition.

Much as the appellant has raised the issue of a grudge between him and the family of the complainant over land, it is instructive that he never raised that issue in his defence. But again even if there was such a dispute, I cannot see how the parents of the complainant could conspire to have their child sexually assaulted so that they could frame the appellant.

The way the complainant narrated what transpired leaves no doubt at all in one's mind that the offence was indeed committed and it was committed by no other than the appellant. The narrative was such that it ruled out the possibility of the complainant having been schooled or told by PW3 and 4 on what to say in court in a bid to frame the appellant.

The complainants' evidence was ably corroborated by the evidence of PW1, the clinical officer. She

found upon examination of the complainant a tear on the vaginal wall. She was positive that there was no actual penetration. However, the tear showed that there had been an attempt. She was also of the opinion that the injury was caused by a blunt object – the male genitalia. Further corroborative evidence would be found in the testimony of the complainant's mother (PW3). When she came from the farm, she found the complainant sleeping on the verandah of the house. When she woke her up and she went for a short call, PW3 noticed that she was walking with some difficulties. She came from her short call crying and told her that her private parts were paining. She checked the private parts and noted that she was bleeding there from. It is instructive that PW3 examined her at about 2.30 – 3 p.m on the same day that the offence is alleged to have been committed. In fact that examination was about 4 or so hours after the event. Walking with a limping gait and bleeding from her private part could only have been attributed to the fact that the complainant could have been sexual assaulted. She said so herself to her mother. The complainant's evidence coupled with that of her mother and clinical officer leaves no doubt at all that the offence was committed. I am satisfied that the evidence on record was credible and sufficient to sustain the conviction against the appellant. Since there was no actual penetration according to the clinical officer, the charge of attempted defilement was properly laid against the appellant and the conviction was safe.

I think however, that the sentence imposed was manifestly harsh and excessive. The appellant was a first offender. Much as the learned magistrate in her sentencing notes indicated that mitigation had been considered, she did not however justify why she felt that 20 years imprisonment was appropriate. Much as sentencing is a matter of the discretion of the trial court, and should not be interfered with unless it is shown that the discretion was exercised whimsically, by taking into account what ought not to or failing to take into account what ought to be or unless otherwise the sentence is manifestly harsh and excessive, in this case, that latter should be the reason why I should interfere with the sentence. I therefore reduce the sentence imposed from 20 years to 10 years effective from 11th July 2009. The appeal on sentence succeeds to that limited extend. Otherwise the appeal on conviction is dismissed.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH DAY** of **JULY 2012.**

ASIKE-MAKHANDIA
JUDGE